No. 93-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN S. ROBY, *et al.*,

Petitioners,

—v.—

THE CORPORATION OF LLOYD'S, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 30, 1993

145 PP

QUESTIONS PRESENTED

1. Are the anti-waiver provisions of the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") violated when American investors in foreign issuers (who have solicited the investors in the United States) are relegated by the enforcement of forum selection clauses in the foreign sponsor's documentation to a foreign forum and foreign substantive law that (a) requires no registration statements (or comparable affirmative pre-investment decision disclosures); (b) clothes the issuers and the sponsor with full immunity from suit; (c) protects from any liability the individual persons owning, controlling, and managing other sponsor-controlled entities that function as broker-dealers and underwriters; and (d) imposes liability upon those entities (all corporate entities with limited liability) only upon proof of fraudulent intent, reliance, and causation, proof not required for claims under Sections 12(1) and 12(2) of the 1933 Act or Rule 10b-5?

2. May the anti-waiver provisions of the 1933 and 1934 Acts, which contain no exceptions for foreign sponsors, issuers, underwriters, broker-dealers, and their respective controlling persons, be construed to allow an implied exemption under which such foreign parties—but not their domestic counterparts—can by contract exempt themselves from compliance with the substantive regulatory and remedial provisions of the 1933 and 1934 Acts?

3. Does the resulting loss of remedial opportunities under the Acts constitute a waiver of "essential features" of private damage remedies under the Acts, thereby violating the anti-waiver provisions in the terms contemplated by *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 481 (1989)?

LIST OF PARTIES

1)	Petitioners (Plaintiff-Appellants below):	Listed in Appendix A
2)	Respondents (Defendant-Appellees below):	Listed in Appendix B
3)	Plaintiffs below not seeking review:	Richard J. Kissel

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 3

STATEMENT OF THE CASE 5

A. The Parties 5

B. Petitioners' Claims 5

C. Proceedings in the District Court 7

D. Proceedings in the Court of Appeals 9

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 23

APPENDICES

Appendix A: List of Petitioners

Appendix B: List of Respondents

Appendix C: Second Circuit Opinion
Dated June 2, 1993

Appendix D: District Court Opinion and Order
Dated June 12, 1992

Appendix E: District Court Memorandum Opinion
and Order
Dated August 18, 1992

Appendix F: Second Circuit Judgment
Issued June 2, 1993

Appendix G: District Court Opinion
Leslie v. Lloyd's,
No. H-90-11909 (S.D. Tex.)
Dated September 4, 1991

Appendix H: Article
PRIVATE EYE
Lloydy Luck, p. 28
Dated July 2, 1993

Appendix I: Article
INVESTMENT DEALERS' DIGEST
Cheryl B. Strauss, *Do US Investors Need More Foreign Listings?*, p. 16
Dated November 9, 1992

Appendix J: Article
THE NEW YORK TIMES
Floyd Norris, *Daimler-Benz Is Ready to Sign Up With Wall Street*,
Section D, p. 1, col. 3
Dated March 25, 1993

Appendix K: Article
INVESTMENT DEALERS' DIGEST
Hal Lux, *SEC Commissioner Proposes Foreign Listing Mechanism*, p. 12
Dated May 29, 1993

TABLE OF AUTHORITIES

CASES

Allied Artists Pictures Corp. v. Giroux,
312 F. Supp. 450 (S.D.N.Y. 1970) 15

Bonny v. Society of Lloyd's,
784 F. Supp. 1350 (N.D. Ill. 1992) 20

Bonny v. The Society of Lloyd's,
Nos. 92-1662, 2771, 1993 U.S. App.
LEXIS 20145 (7th Cir. Aug. 5, 1993) 20

Haralson v. E.F. Hutton Group, Inc.,
919 F.2d 1014 (5th Cir. 1990) 15

Hugel v. Corporation of Lloyd's,
No. 92-2240, 1993 U.S. App. LEXIS
17106 (7th Cir. July 8, 1993) 20-21

Leslie v. Lloyd's of London,
No. H-90-1907 (S.D. Tex. Sept. 4, 1991) 19

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 20

Pinter v. Dahl,
486 U.S. 622 (1988) 16, 18

Pryor v. United States Steel Corp.,
794 F.2d 52 (2d Cir.), *cert. denied*,
479 U.S. 954 (1986) 15

Riley v. Kingsley Underwriting Agencies, Ltd.,
969 F.2d 953 (10th Cir.), *cert. denied*,
___ U.S. ___, 113 S.Ct. 658 (1992) 9, 19

Roby v. The Corporation of Lloyd's,
796 F. Supp. 103 (S.D.N.Y. 1992) 2

Roby v. The Corporation of Lloyd's,
[1992 Transfer Binder]
Fed. Sec. L. Rep. (CCH) ¶ 96,971,
at 94,164 (S.D.N.Y. Aug. 18, 1992) 2

Roby v. The Corporation of Lloyd's,
[1992-1993 Transfer Binder]
Fed. Sec. L. Rep. (CCH) ¶ 97,458,
at 96,555 (2d Cir. June 2, 1993) 2

Rodriguez de Quijas v. Shearson/Am. Exp.,
490 U.S. 477 (1989) . . . . . *passim*

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) . . . . . *passim*

Schine v. Schine,
254 F. Supp. 986 (S.D.N.Y. 1966) 15

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220 (1987) 16

Special Transp. Serv., Inc. v. Balto,
325 F. Supp. 1185 (D. Minn. 1971) 11, 15

Wilko v. Swan,
346 U.S. 427 (1953) 9

STATUTES

9 U.S.C. §§202-208 9

Securities Act of 1933, Section 5(a),(b)
15 U.S.C. §§77e(a),(b) 16, 17, 19

Securities Act of 1933, Section 12(1)
15 U.S.C.§77*l*(1) . . . . . *passim*

Securities Act of 1933, Section 12(2)
15 U.S.C.§77*l*(2) . . . . . *passim*

Securities Act of 1933, Section 14
15 U.S.C. §77n 3, 8

Securities Act of 1933, Section 15
15 U.S.C. §77o 5

Securities Act of 1933, Section 22
15 U.S.C. §77v 2

Securities Exchange Act of 1934, Section 20(a)
15 U.S.C. §78t(a) 5

Securities Exchange Act of 1934, Section 27
15 U.S.C. §78aa 2

Securities Exchange Act of 1934, Section 29(a)
15 U.S.C. §78cc(a) 3, 8

Organized Crime Control Act of 1970, Section 1964(c)
18 U.S.C. §1964(c) 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 2

SECURITIES AND EXCHANGE COMMISSION REGULATIONS

Regulation D
17 C.F.R. §§230.501-508 17

17 C.F.R. §230.501(a) 17

17 C.F.R. §§230.502(a)-(c) 17

Rule 10b-5
17 C.F.R. §240.10b-5 . . . . . *passim*

CONVENTIONS

The United Nations Convention On Contracts For The International Sale Of Goods, 19 I.L.M. 671 (April 11, 1980) 9

The United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (as adopted and codified, 9 U.S.C. §§201-208) 8-9

LAW REVIEW PUBLICATIONS

Kristine Paden, Note, *Choice of Forum, Choice of Law, and Arbitration Clauses Override U.S. Security Rights: Riley v. Kingsley Underwriting Agencies, Ltd.*, 6 TRANSNAT'L LAW. 431, 450-460 (1993) 19

OTHER PUBLICATIONS

Lloydy Luck, PRIVATE EYE, July 2, 1993, at 28 22

Hal Lux, *SEC Commissioner Proposes Foreign Listing Mechanism,* INVESTMENT DEALERS' DIGEST, May 29, 1993, at 12 12

Floyd Norris, *Daimler-Benz Is Ready to Sign Up With Wall Street*, THE NEW YORK TIMES, March 25, 1993, § D, at 1, col. 3 12

Cheryl B. Strauss, *Do US Investors Need More Foreign Listings?,* INVESTMENT DEALERS' DIGEST, November 9, 1992 at 16 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

John S. Roby and the 109 other appellants (listed in Appendix A) petition for a writ of certiorari to review a decision and judgment of the United States Court of Appeals for the Second Circuit. In the face of the anti-waiver provisions of the 1933 and 1934 Acts, that decision enforces pre-dispute forum selection and choice-of-law clauses that relegate American investors' claims to English tribunals to be adjudicated under English substantive law, thereby depriving the investors of all their rights under the 1933 and 1934 Acts. The practical consequence of the Court of Appeals' application of the anti-waiver provisions is to permit foreign companies that raise capital from American investors through direct solicitations in the United States to escape, by the terms of standard form contracts, all civil damage liability under the Acts.

OPINIONS BELOW

The decision of the Court of Appeals affirming the judgment and orders of the District Court on the basis of the forum selection clauses is reported at [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,458 at 96,555 (2d Cir. June 2, 1993) (Appendix C). The decision of the District Court dismissing the complaints against the syndicate defendants is reported at 796 F. Supp. 103 (S.D.N.Y. 1992) (Appendix D), and its decision dismissing the complaint as to the remaining defendants on the basis of the forum selection clauses is reported at [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,971 at 94,164 (S.D.N.Y. Aug. 18, 1992) (Appendix E).

JURISDICTION

The judgment of the Court of Appeals (Appendix F) was entered on June 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on Section 22 of the 1933 Act (15 U.S.C. §77v), Section 27 of the 1934 Act (15 U.S.C. §78aa), and Section 1964(c) of the Racketeer Influenced Corrupt Organizations provisions of the Organized Crime Control Act of 1970 (18 U.S.C. §1964(c)) ("RICO"), which separately confer federal jurisdiction over suits brought to enforce liabilities arising under these respective statutes. Jurisdiction in the Court of Appeals was based on 28 U.S.C. §1291.

STATUTES AND REGULATIONS INVOLVED

1933 Act, §14 (15 U.S.C. §77n):

§77n. Contrary stipulations void

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

1934 Act, §29(a) (15 U.S.C. §78cc(a)):

§78cc. Validity of contracts

(a) Waiver provisions. Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

1933 Act, §12(1) and §12(2) (15 U.S.C.§77*l*(1)-(2)):

§77*l* Civil Liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title [Section 5 of the 1933 Act prohibiting the offering and sales of non-exempt unregistered securities in non-exempt transactions], or

(2) offers or sells a security (whether or not exempted by the provisions of 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate

commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Securities and Exchange Commission ("SEC") Rule 10b-5 (17 C.F.R. §240.10b-5):

Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

A. The Parties

Petitioners, the plaintiffs below, are known as Names at respondent The Corporation of Lloyd's ("Lloyd's"). They sued Lloyd's, its governing boards (the Committee and the Council), 328 Lloyd's-sponsored insurance syndicates (identified by their respective syndicate numbers at Lloyd's), the Member's Agents that were responsible for representing petitioners' interests in connection with their investments in the syndicates, the Managing Agents that managed the affairs of the syndicates, and the Member's and Managing Agents' respective controlling persons, for violations of Sections 12(1), 12(2) and 15 of the 1933 Act, Rule 10b-5 promulgated under the 1934 Act, Section 20(a) of the 1934 Act, and the civil liability provisions of RICO.

B. Petitioners' Claims

Petitioners allege that their investments in Lloyd's-sponsored syndicates constituted the purchases of "securities" within the meaning of the 1933 and 1934 Acts and that the syndicates were suable under those acts as "issuers" of the securities. For purposes of its decision, the Court of Appeals adopted petitioners' contentions (Appendix C, 7c, 10c).

Specifically, petitioners allege that respondents raised over $1 billion in American capital for the syndicates through systematic solicitations of American investors in the United States.[1] Petitioners allege that the solicitations and sales of interests in Lloyd's-sponsored syndicates occurred without the required registration of these

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[1] The respondent syndicates (and many other Lloyd's-sponsored syndicates) have carried on substantial insurance business in the United States. At the time petitioners' complaint was filed, the Lloyd's American Trust Fund held more than $9 billion for the syndicates' accounts at Citibank, N.A. in New York City (Appendix D, 19-20d). These funds are subject to Lloyd's control.

offerings or other adequate pre-investment decision disclosures to prospective investors.

Actionable misrepresentations and nondisclosures alleged by petitioners include the syndicates' material undisclosed liabilities for "long-tail" asbestos, pollution, and professional liability risks undertaken in syndicate years of account[2] long before the years for which petitioners were investors. These undisclosed liabilities arose from "reinsurance to close" transactions by which the syndicates assumed one or more previous years' liabilities. The inadequacies of the "reinsurance to close" premium payments assured that investors in the same syndicate for succeeding years would incur substantial losses from these transactions.

Petitioners also allege that there was no disclosure of the huge liabilities that some syndicates assumed by taking on reinsurance risks generated by the recently well-publicized "LMX spiral." The "LMX spiral" refers to the practice by which a group of London-based insurance brokers (and Managing Agents) would pass responsibility for reinsuring catastrophic risks (such as damage from hurricanes and earthquakes) from syndicate to syndicate, until the risks were finally lodged back with the syndicates that had ostensibly obtained reinsurance for the risks they had originally accepted. In this manner, the "LMX spiral" concealed from investors in these syndicates the failure of the Managing Agents to spread risk through bonafide reinsurance. Each time the "reinsurance" was passed from

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[2] Lloyd's syndicates operate on separate calendar years of account. For each year, with the advice of their respective Member's Agents, Names make annual investment decisions about the syndicates in which they will invest, and to what extent. Names' investments are represented in part by deposits in the form of cash, securities, or letters of credit held by Lloyd's for the syndicates. Names also assume unlimited personal liability for their pro rata share of all syndicate losses for each year in which they are investors. As a result, Names are exposed to losses far in excess of the amounts of their original deposits.

syndicate to syndicate, the brokers and Managing Agents collected substantial commissions.

Petitioners allege that collectively they sustained millions of dollars of losses[3] as a result of respondents' violations of the federal securities laws. Lloyd's has publicly reported aggregate losses of more than $9.1 billion for its last three reported years of account (1988, 1989 and 1990).[4]

C. Proceedings in the District Court

The District Court dismissed petitioners' consolidated amended complaint without ruling on the merits of their claims under the federal securities laws.

The District Court first ruled that the syndicates—concededly not jural entities suable under English law—were by virtue of that fact

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[3] Petitioners' losses include seizure of their deposits by Lloyd's, as well as Lloyd's demands that they pay uncollateralized losses and, in some cases, make working capital advances. Lloyd's has demanded payments from most petitioners that are multiples of their original deposits. Some petitioners and other American Names have been sued in London for those demands.

Most petitioners (like other American Names) have no assets in the United Kingdom and, therefore, once American Names' deposits are seized, Lloyd's must seek to enforce any English judgments that it obtains against the Names by separate enforcement proceedings in the United States. Lloyd's need for ultimate recourse to American courts to enforce English judgments makes all the clearer that application of the forum selection and choice-of-law clauses results in a prohibited waiver of petitioners' rights under the 1933 and 1934 Acts. For, in those enforcement proceedings, Lloyd's will assert that the American Names' defenses and counterclaims under the 1933 and 1934 Acts are barred by those clauses.

[4] Lloyd's syndicates report three years in arrears for a given year of account. Thus, 1989 results were not announced until 1992, and 1990 results were not announced until 1993. Similarly, 1991 and 1992 results are as yet not publicly disclosed.

alone not suable as "issuers" under the 1933 or 1934 Act (Appendix D).

The District Court later ruled that the forum selection clauses in Lloyd's standard documentation (Lloyd's General Undertaking with each of the Names, as well as the Lloyd's-mandated forms of agreement between Names and their Member's Agents and between the Member's Agents and the Managing Agents of the syndicates) should be specifically enforced to effect a dismissal of this action (Appendix E). The dismissal forces petitioners to forgo their claims or litigate them against respondents, to the limited extent possible under English law, in such judicial and arbitral forums of England as are appropriate under English rules and under English substantive law.

The District Court dismissed petitioners' complaint even though it was undisputed that English choice-of-law rules preclude recognition of any foreign tort claims, whether common law or statutory. English substantive law provides remedies against only some classes of respondents (others being subject to immunities or unchallengeable legal defenses). Even as to those suable classes of respondents, English law imposes liability only under theories that are fault- and causation-based and therefore more difficult and expensive to establish than claims under the federal securities laws. The District Court rejected petitioners' contention that enforcement of the forum selection clauses, in tandem with the choice-of-law clauses, violates the anti-waiver provisions of Sections 14 of the 1933 Act and 29(a) of the 1934 Act. It reasoned that no prohibited waiver exists so long as *some* remedies against *some* respondents are theoretically available in England under English law.

The District Court based enforcement of the forum selection clauses on the belief that this Court's opinion in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) "controlled" and required, in virtually any case involving a "truly international" transaction, that forum selection clauses be rigorously enforced. The District Court found further support for its conclusion by reference to the *United*

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (as adopted and codified, 9 U.S.C. §§201-208) ("the UN Convention"), which it believed to be applicable.

D. Proceedings in the Court of Appeals

Although it affirmed the District Court's judgment insofar as it enforced the forum selection clauses, the Court of Appeals disavowed the District Court's reasoning and spotlighted the important issues raised by this petition.

The Court of Appeals did *not* apply the UN Convention, declaring that its application to securities transactions was uncertain, presumably because four Justices dissenting in *Scherk* found the Convention inapplicable (417 U.S. at 526-527), while the five-Justice majority declined to decide its applicability (417 U.S. at 520, n.15) (Appendix C, 19-20c, n.2).[5] The Court of Appeals stated that neither *Scherk* nor any other decision of this Court was controlling

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[5] The UN Convention, although adopted by 25 nations on June 7, 1959, was not acceded to by the United States until September 30, 1970 and then with the express reservation that it applied only to "commercial relationships" (9 U.S.C. §202). It is most unlikely that Congress intended to make private damages claims under the 1933 and 1934 Acts arbitrable under the UN Convention. In 1958 (at the time of the Convention's promulgation) and in 1970 (at the time of American accession), *Wilko v. Swan*, 346 U.S. 427 (1953), and Court of Appeals decisions after *Wilko*, applied the anti-waiver provisions to bar any arbitration of these claims. The conclusion that sales of securities are not "commercial" within the meaning of the UN Convention or the American accession legislation is reinforced by the *United Nations Convention on Contracts for the International Sale of Goods*, 19 I.L.M. 671, 672 (April 11, 1980). Article 2(d) of Part I of that convention provides that it "does not apply to sales: * * (d) of stocks, shares, investment securities, negotiable instruments or money * *."

and rejected the District Court's and the Tenth Circuit's[6] use of the shibboleth "truly international" as a litmus test for enforcing the forum selection clauses (Appendix C, 18-19c). Instead, referring to policies reflected in the anti-waiver provisions, the Court of Appeals found that "there [was] a serious question whether United States public policy has been subverted by the Lloyd's clauses." (Appendix C, 21c)

Although clearly in error on some important specifics of English law, the Court of Appeals nonetheless correctly concluded that "the United States securities laws would provide the [petitioners] with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements * *" as compared to their chance of success under relevant English law (Appendix C, 27c).

The Court of Appeals then proceeded to adopt a novel standard for enforcing the anti-waiver provisions. In its view, the impairment of petitioners' substantial rights and remedies, in itself, was not sufficient to violate the anti-waiver provisions. It held that petitioners bore the burden of showing that the foreign remedies available to them were "insufficient to deter [foreign] issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure * *" (Appendix C, 24c). The Court of Appeals found that petitioners failed to meet its newly announced standard.[7]

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[6] See *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992).

[7] That standard is essentially impossible to satisfy. How could private plaintiffs realistically be expected to gather data showing that any defendants were influenced to make more or less pre-investment financial disclosure by differences in the liability standards of American and English law? And what group of potential defendants would be targeted for such an inquiry—those with immunity or equivalent defenses

(continued...)

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' application of the anti-waiver provisions of the 1933 and 1934 Acts, even accepting its inaccurate conclusions about the nature and extent of petitioners' rights and remedies under English law, creates a significant loophole in the protection afforded to American investors in securities offered and sold by foreign issuers and their agents. That loophole violates the plain meaning of the anti-waiver provisions.

A. The decision creates an implied exception to the anti-waiver provisions in favor of foreign-based sellers of securities, when in fact Congress has provided no such exception.[8]

B. The decision creates that exception at a time when more than 890 foreign public companies have listed American Depositary Receipts (ADR's) for trading their securities on American stock exchanges and over-the-counter markets, and foreign issuers are seeking direct listings of their securities on American stock exchanges. See Cheryl B. Strauss, *Do US Investors Need More Foreign Listings?*,

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[7](...continued)
under English law, those with potential exposure, or both, and with what relative weight given to each group? In the light of these inquiries made relevant by its test, the Court of Appeals' test can be fairly said to require undisciplined speculation about potential defendants' behavioral propensities.

[8] Presumably, for example, that the Court of Appeals would not permit a domestic issuer to enforce a provision in its stock subscription agreements that requires the purchasers to sue only under some state law that provides a higher threshold for issuer liability or a lesser measure of damages than those provided by the 1933 and 1934 Acts. See, *e.g.*, *Special Trans. Serv., Inc. v. Balto*, 325 F. Supp. 1185, 1187 (D. Minn. 1971) (limitation of liability provision unenforceable under §29(a) of the 1934 Act); see also the cases cited in subsection II(B) below.

INVESTMENT DEALERS' DIGEST, Nov. 9, 1992, at 16 (Appendix I).[9] The Court of Appeals' ruling removes policy decisions regarding disclosure requirements for foreign issuers from the SEC. It allows foreign issuers to create their own disclosure rules through standard form contracts by which American investors waive their rights under the 1933 and 1934 Acts.

C. This discrimination in favor of foreign issuers and promoters places American issuers at severe competitive disadvantages. American issuers remain subject to risks for non-compliance with registration and disclosure requirements, and must incur the expense of compliance. By contrast, their foreign counterparts may eliminate both the risk of non-compliance and compliance expense, simply by using standard form contracts that purport to comply with the Court of Appeals' new standard for escaping the anti-waiver provisions. Congress has not authorized such an uneven playing field to the great detriment of American business.

D. By promoting full and fair disclosure, the federal securities laws were intended to protect American capital resources, irrespective of the nationality of the parties seeking to raise capital in

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[9] For example, New York Stock Exchange Chairman William Donaldson has been vigorously advocating direct listings of foreign issuers under financial disclosure rules less stringent than those imposed on domestic issuers, despite the opposition of former SEC Chairman Richard C. Breeden. *Ibid.* Before his resignation, Mr. Breeden attempted to negotiate conditions for compliance with SEC disclosure rules that would apply to a direct listing of the German automobile manufacturer Daimler-Benz, A.G. on the New York Stock Exchange. See Floyd Norris, *Daimler-Benz Is Ready to Sign Up With Wall Street*, THE NEW YORK TIMES, March 25, 1993, §D, at 1, col. 3 (Appendix J). Unlike former Chairman Breeden, SEC Commissioner Richard Roberts has urged a mechanism for listing securities of foreign issuers that would dilute for these foreign issuers the disclosure requirements applicable to American issuers. See Hal Lux, *SEC Commissioner Prepares Foreign Listing Mechanism*, INVESTMENT DEALER'S DIGEST, May 24, 1993, at 12 (Appendix K).

the United States, from exploitation and misallocation. By creating for foreign issuers a judicial exception to that policy, the Court of Appeals has frustrated the flow of that necessary investment information.

E. The Court of Appeals' decision has ratified Lloyd's policy of refusing to make disclosure to American Names of material information regarding the secretive operations of Lloyd's syndicates.[10] Moreover, the Court of Appeals has created such a special Lloyd's exemption based on a misunderstanding of English law (see footnotes 11 and 16), and on the speculative and unsupportable assertion that English law creates adequate incentives for disclosure and deterrents against investor exploitation. In fact, the inadequacy of any such incentives is demonstrated by the fact that the American Names were not given the disclosures to which they would have been entitled under American law. The speculation that such incentives might exist cannot be credited where English law provides Lloyd's and its governing councils with statutory immunity, holds the syndicates not to be suable as jural entities (despite their economic and operational separateness and the fact that they hold most of Lloyd's total capital),[11] effectively denies "controlling person"

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[10] This policy includes providing, as the principal form of pre-investment decision disclosure, the uninformative, one-page "syndicate lists," which disclose only the extent of the Names' projected participation in specified syndicates. The syndicate lists do not disclose such material risks as the syndicates' massive "long-tail liabilities" for previous years of account or the syndicates' involvement in the "LMX spiral."

[11] The Court of Appeals' treatment of the syndicates assumes that the syndicates are suable as "issuers" under the federal securities laws (Appendix C, 7c), but fails to note that they are not suable under English law (Appendix C, 24-27c). Thus, the Court of Appeals' analysis skips over pertinent questions raised by its own novel analysis: Under English law, what incentive for issuer-based disclosure can there be when the issuers, as the principal repositories of Lloyd's capital, are themselves not suable? Is there incentive for disclosure when substantial

(continued...)

liability, and limits petitioners to fault- and causation-based remedies against certain limited liability entities.

II. The Court of Appeals' construction of the anti-waiver provisions of the 1933 and 1934 Acts is inconsistent with this Court's analysis of those provisions in *Rodriguez* and with other decisions from the lower courts.

A. In *Rodriguez*, Justice Kennedy, speaking for a five-judge majority, wrote that the anti-waiver provisions did *not* invalidate arbitration clauses in agreements between registered broker-dealers and their customers because, among other things, the customers retained in arbitration their substantive rights and remedies under the Act, and because the Act's choice-of-forum (venue) provisions did not constitute "essential features" of either Act (490 U.S. at 481). He stated that the impairment of an "essential feature" would be "bar[red]" by the anti-waiver provisions "properly construed * *" (*Ibid.*). He identified one such "essential feature" as "the provision [in Section 12(2) of the 1933 Act] placing on the seller the burden of proving lack of scienter when a buyer alleges fraud * *" (*Ibid.*).[12]

The impairment of petitioners' remedial opportunities caused by their relegation to English law and English tribunals is far greater than a shift in the burden of proof on a single element of a claim under Section 12(2) of the 1933 Act. Here, (i) central defendants — Lloyd's and its governing bodies — are not subject to liability at all; (ii) the syndicates are not suable, and judgments cannot be enforced

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[11](...continued)
syndicate assets are maintained in the $9 billion Lloyd's American Trust Fund located in the United States, but suit can only be brought in England, where Lloyd's trust funds are not subject to legal process?

[12] Presumably, the four dissenting Justices, who would have invalidated the arbitration clauses under the anti-waiver provisions, would have accepted the majority's view on this narrow point.

against syndicate assets; (iii) failure to register claims under Section 12(1) of the 1933 Act are not recognized; (iv) "controlling person" liability does not exist; and (v) liability against the limited liability entities (Member's Agents and Managing Agents) is fault-based and requires proof of fraudulent intent, together with reliance and causation, or at least the latter two elements.

B. The Court of Appeals' analysis and conclusion are inconsistent with lower court decisions that have found impermissible waivers of "compliance with *any* provision" or "*any* rule and regulation" of the SEC under the anti-waiver provisions, by reason of the contractual impairment of investor rights or remedies available under the 1933 and 1934 Acts. (Emphasis added.) *See, e.g., Pryor v. United States Steel Corp.*, 794 F.2d 52, 56 (2d Cir.), *cert. denied*, 479 U.S. 954 (1986) (contractual waiver of proration rights under Section 14(d)(6) of the 1934 Act is invalid); *Special Transp. Serv., Inc.*, 325 F. Supp. at 1187 (contractual limitations on damage remedy is void); *Allied Artists Pictures Corp. v. Giroux*, 312 F. Supp. 450, 451 (S.D.N.Y. 1970) (director may not limit, by a release instrument, his prospective liability for short-swing profits under Section 16(b) of the 1934 Act); *Schine v. Schine*, 254 F. Supp. 986, 988 (S.D.N.Y. 1966) (prospective release of claims arising under the 1934 Act would be void); *cf. Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1034 (5th Cir. 1990) (anti-waiver provisions "void waivers of rights * * ").

C. As explained further in subsections II(D)-(F), the Court of Appeals' construction of the phrase "waive compliance" in the anti-waiver provisions is inherently unreasonable and self-contradictory. Its construction is based upon the implicit assumption that "waive compliance" means that the challenged contracts expressly authorize non-conformity with the transactional conduct mandated by the Acts (in this case, registration and other pre-investment decision disclosure), irrespective of the degree to which investor rights and remedies under the Acts are actually impaired by application of choice of forum and choice of law clauses in those contracts. But, as stated

in the *Rodriguez* dictum (subsection II(A)) and as the lower court cases applying the anti-waiver provisions illustrate (subsection II(B)), the anti-waiver provisions outlaw *any* material dilution of investors' substantive rights or remedies arising under the Acts—without imposing upon investor plaintiffs undue burdens of proof or persuasion.[13]

D. As applied to petitioners' claims under Section 12(1) of the 1933 Act, the Court of Appeals' construction of the phrase "waive compliance" stands the anti-waiver provisions on their heads: it approves routine enforcement of clauses in foreign issuers' contracts that purport to waive all investor rights under that "provision."[14] The transactional conduct (as opposed to the remedial obligations) mandated by Section 12(1) of the 1933 Act are the filing of registration statements and the delivery of the required prospectuses to investors in advance of their purchases of securities, all in conformity with Sections 5(a) and (b) of the 1933 Act (15 U.S.C. §77e(a),(b)). It is undisputed that English courts categorically refuse to recognize any Section 12(1) claims, and English law provides no equivalent registration obligation or remedy for failure to register.

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[13] The cases cited above require an objective test for ascertaining whether there has been a prohibited waiver. This Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) assumed as much when it stated:

> The voluntariness of the agreement is irrelevant to [the] inquiry: if a stipulation waives compliance with a statutory duty, it is void under §29(a) [of the 1934 Act], whether voluntary or not.

The Court of Appeals' decision here, while positing an apparently objective test, in practice would require a highly speculative and wide-ranging empirical inquiry. The virtual impossibility of satisfying the test effectively repeals the anti-waiver provisions. See footnote 7.

[14] This Court has recognized that the "registration requirements are at the heart of the [1933] Act, and §12(1) imposes strict liability for violating those requirements," which it described as "a particularly important enforcement tool . . ." *Pinter v. Dahl*, 486 U.S. 622, 636 (1988).

Thus, the relegation to English tribunals and English law resulting from enforcement of Lloyd's forum selection clauses removes any inducement to comply with Section 12(1)'s requirements.[15]

E. The Court of Appeals' construction of the "waive compliance" phrase is equally wrong with regard to petitioners' claims under Section 12(2) of the 1933 Act and Rule 10b-5. The Court of Appeals found that enforcement of Lloyd's forum selection clauses materially impaired petitioners' "chance of success" on these claims (Appendix C, 27c), because certain classes of "deep-pocket" defendants were not suable under English Law (Lloyd's, its governing bodies, the syndicates, and the controlling persons of the Member's Agents and Managing Agents) and because only the fault- and causation-based liability standards were applicable to those limited-

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[15] The Court of Appeals' rejection of the Section 12(1) claims is not supported by its own test for applying the phrase "waive compliance" (Appendix, 26c). Instead, the Court of Appeals suggested that there were substantive flaws in petitioners' Section 12(1) claims. It observed that the SEC had not required Lloyd's syndicates to file registration statements under Section 5 of the 1933 Act, based on the exemption provided by the SEC's Regulation D (17 C.F.R. §§230.501-508) (Appendix, 26c). The Court of Appeals was procedurally wrong in treating this issue on the merits without a full record and prior notice to petitioners. It was substantively wrong as well, ignoring that the Regulation D limits the exemption by several tests that Lloyd's fails to meet: by limiting the permitted number of "unaccredited investors" participating in the "offering" (17 C.F.R. §230.501(a)); by requiring "unaccredited investors" to be furnished with adequate pre-investment decision information (17 C.F.R. §230.502(b)); by denying exemption to an "offering" that is "integrated" with related "offerings" (*e.g.*, offerings by the same Lloyd's syndicates through different Member's Agents that, when evaluated on an "integrated" basis, fail to comply with Regulation D) (17 C.F.R. §230.502(a)); and by denying exemption where there has been a "general solicitation" (17 C.F.R. §230.502(c)). The Court of Appeals recognized that Lloyd's minimum net worth and earning-power requirements for most investors do not conform to the SEC minimum requirements for "accredited investor" status under Regulation D (Appendix C, 9c).

liability entities that remained suable under English law (Member's Agents and Managing Agents). That finding, without more, should have triggered the anti-waiver provisions to make the Lloyd's forum selection clauses unenforceable. By contrast, the Court of Appeals' test allows routine enforcement of foreign selection clauses merely if the investor *may* have *some* remedy against *some* defendant in the foreign tribunal under the foreign law, irrespective of the diminution of the investors' practical ability to obtain meaningful redress.[16]

F. The Court of Appeals' test violates the plain meaning of Section 12 of the 1933 Act, the "provision" that affords express remedies to aggrieved purchasers of securities. Section 12 provides for statutorily-mandated consequences when "sellers" of securities, as defined in the broad sense contemplated by the statute (*see, e.g., Pinter v. Dahl*, 486 U.S. 622 (1988)), violate either subsection 1 or 2. Those subsections state that such "sellers" "shall be liable" to the aggrieved purchasers. The Court of Appeals has substituted the phrase "may or may not be liable under foreign law prescribed by the seller's contract" for the phrase "shall be liable." In relieving the respondent "sellers" of their statutorily-mandated obligations, the

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[16] In attempting to identify applicable English substantive rules, the Court of Appeals failed to understand the proper "pecking order" at Lloyd's. It fastened on the contractual disclosure obligations of the Member's Agents to the Names as the linchpin for its finding that there was an adequate foreign remedy and inducement to comply with the disclosure mandates of the 1933 and 1934 Acts (Appendix C, 26c). However, the Member's Agents are in reality brokers matching Names with syndicates. They do not have the control over the issuers—here the syndicates, which are managed and controlled by their respective Managing Agents—to command disclosure of negative information. Insofar as the Court of Appeals intimated that the Managing Agents had direct disclosure obligations to Names, it misread §4.2(j) of the Managing Agent's Agreement. That provision calls for direct disclosure only if the Name's interests in a particular syndicate are not represented by a Member's Agent.

Court of Appeals has enabled respondents to "waive compliance" with their obligations to petitioners under Section 12.[17]

III. Issues raised by other cases involving American Names would be resolved by granting of the writ in this case.

A. The Tenth Circuit's decision in *Riley*, 969 F.2d at 953, was the first of the recent cases involving American Names. The Name's petition for review was rejected by this Court (113 S.Ct. at 658).[18] However, the arguments made here about the effect of the anti-waiver provisions and the inadequacies of English law were not made there. In addition, the Court of Appeals here expressly "depart[ed]" (Appendix C, 21c) from *Riley*, finding its analysis unsatisfactory.

B. In *Leslie v. Lloyd's of London*, No. H-90-1907, slip op. (S.D. Tex. Sept. 4, 1991) (Appendix G), the District Court refused to enforce Lloyd's forum selection clauses. It reasoned that there was

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[17] Differences in the texts of Rule 10b-5 and Section 12 are not material. First, Rule 10b-5 is formulated in almost identical terms to Section 5 of the 1933 Act ("It shall be unlawful * *."), which in turn is incorporated into Section 12(1) of the 1933 Act. Second, since this Court has consistently construed Rule 10b-5 and Section 12(2) of the 1933 Act *in pari materia* to harmonize the panoply of private remedies available under the federal securities laws, differences in form, as opposed to substance, are treated as irrelevant. See *Rodriguez*, 490 U.S. at 484-85. Third, the interests of judicial economy would be disserved if only some, but not all, of petitioners' securities act claims were assertable in the United States.

[18] *Riley's* reasoning was criticized, and review of the issues raised there was urged, in a recent law review note. See Kristine Paden, Note, *Choice of Forum, Choice of Law, and Arbitration Clauses Override U.S. Security Rights: Riley v. Kingsley Underwriting Agencies, Ltd.*, 6 TRANSNAT'L LAW. 431, 450-460 (1993).

no controlling decision of this Court and that therefore the four-Justice dissent in *Scherk* provided the soundest approach to the issue.

C. In *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992), the District Court overruled a magistrate judge's recommendation that the Lloyd's forum selection clauses be held unenforceable under footnote 19 of this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). There, this Court stated that, if "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies [there, for antitrust violations], we would have little hesitation in condemning the agreement as against public policy" (784 F. Supp. 1354-60). In *Bonny*, the District Court, like the District Court here, believed *Scherk* to be controlling and found the footnote 19 test inapplicable, for the question-begging reason that enforcement of the forum selection clause resolves potential conflicts-of-law problems[19] (784 F. Supp. at 1353-54). On August 5, 1993, the Seventh Circuit affirmed the District Court's judgment, adopting a combination of the District Court's reasoning in that case and the Second Circuit's reasoning in this case. *Bonny v. The Society of Lloyd's*, Nos. 92-1662, 2771, 1993 U.S. App. LEXIS 20145, at *15-21 (7th Cir.

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[19] Although the desire for predictability in international transactions (and particularly the wish to eliminate conflict-of-law issues) is a relevant consideration in some cases, this desire is a neutral factor when the anti-waiver provisions are considered. If the anti-waiver provisions are enforced, the forum selection and choice-of-law clauses must be invalidated. The result leads to a state of predictability: foreign issuers soliciting American investors are subject to the requirements of, and are subject to suit for failure to comply with their obligations under, the 1933 and 1934 Acts. Thus, the policy choice is not between upholding or defeating predictability in international transactions, but simply whether American investors will or will not retain their rights and remedies under the federal securities laws.

August 5, 1993).[20] Counsel for the *Bonny* plaintiffs has advised us that they will file a petition seeking review by this Court of the Seventh Circuit's decision.

IV. The SEC, the agency charged with enforcement of the federal securities laws, has not acted to protect American Names or to address any of the larger issues raised by the Court of Appeals' decision. Its default in this regard warrants the granting of the writ and plenary consideration by this Court of the issues presented by this petition.

A. While discreetly criticizing the SEC for providing "little guidance", at least on some aspects of the case, (Appendix C, 11c), the Court of Appeals implied that the SEC's default weighs against petitioners' efforts to vindicate their rights to sue under the federal securities laws in the United States. However, in the absence of a publicly disclosed, principled position from the SEC, this Court's policy of according deference to the enforcement agency has no place, because the agency has offered nothing to which any court might defer.

B. The SEC's default in seeking broad enforcement of the anti-waiver provisions is puzzling. It is particularly so in the light of SEC opposition to relaxed disclosure requirements for foreign issuers that seek listings on American stock exchanges, especially since the SEC's ability to regulate these standards may require vigorous enforcement of the anti-waiver provisions (see subsection I(B)). The

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[20] The Seventh Circuit also relied on its recent decision in *Hugel v. Corporation of Lloyd's*, No. 92-2240, 1993 U.S. App. LEXIS 17106 (7th Cir. July 8, 1993), where the plaintiffs sued only on common law contract and tort claims. The Seventh Circuit's parity of treatment of those common law claims and claims under the 1933 and 1934 Acts deprives the anti-waiver provisions of any meaningful effect.

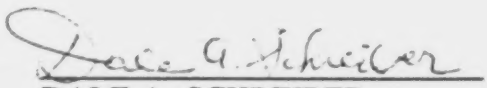
apparent inconsistency in the SEC's approach[21] should be regarded as another compelling factor favoring review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 30, 1993

Respectfully submitted,



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[21] The SEC began a private investigation of Lloyd's in 1991, and abruptly halted the investigation in June 1992, shortly after a visit to the United States by British Prime Minister Major. A recent article appearing in a British publication, *Lloydy Luck*, PRIVATE EYE, July 2, 1993, at 28 (Appendix H), asserts that the SEC investigation was halted by Mr. Major's intervention.

APPENDIX A

APPENDIX A

PETITIONERS

John H. Abeles
Roger Anderson
Charles G. Bentzin
Peter A. Benz
Susan B. Bolin
Amanda A. Bryan
Florence E. Bryan
Suzanne E. Bryan
Anne L. Bryan
John M. Bryan
Robert S. Clarke
Patrick J. Collins
Thorton Cooke
Daniel F. Coughlin
Robert L. Cox
Albert B. Crutcher Jr.
Donald D. Decenso
James S. Deely
Stephen E. Delaszlo
Marco Dilaurenti
John D. Diver
David Dolgenos
Lydia P. Dugan
Albert W. Dugan
Robert E. Eakin
Lee R. Ellenburg, Jr.
Jules I. Epstein
Tillman R. Fesperman
Robert F. Fogelman
Martha H. Fogelman
Robert S. Forman
Leonard Friedman
Karole E. Glaser
Marvin Goodson
Oliver R. Grace, Sr.
Jack D. Gray
Andrew Grossman
Kathryn B. Hampton
Alton B. Harris
A. Cary Harrison III
Michael C. Hartley
Carol M. Hathaway
Linda Tufts Hebbler
Jerome E. Hickey
Roger W. House
Alan J. Hunken
Charles A. Janda
Dale A. Jenkins
Sidney Kahn
Audrey W. Katz
Robert P. Keith
Robert B. King
Alan W. Kral
James E. Krause
Nancy Kurz
Raymond C. Lee
Jeanne Long
Janis L. Macmillan
Charles A. Malkemus
Andrew H. Marks
J. Stephen Marks
Mary L. Marks

James L. McCormick
Paul W. McMullan
Allison Mercer
Norman N. Mintz
Henry A. Mitchell, Jr.
Charles E. Morris
Alvin B. Moss
William B. Murray
Martha Long Navarro
Margaret W. Nichol
Katherine S. Nordhaus
James J. O'Sullivan, Jr.
Charles W. Olson
Rosemary H. Pasek
Joseph N. Pattison
Libby B. Pohoryles
Charles F. Robinson
John H. Robison
Joe R. Roby
John S. Roby
Herbert A. Rubin
Jacob A. Rubin
Robert W. Ruder
Gregory J. Salko
Constantine Salonitis
Arthur Schechner
Charles Schnaid
Louis B. Schoen
Robert G. Sims
K. Dino Sirakides
Frederick E. Smithline
Anthony B. Soskin
Joel M. Spiro
Gilchrist B. Stockton Jr.
William N. Stout
Herman G. Sturman
Kenneth M. Taylor
James D. Tufts, III
James D. Tufts, II
Alyson Warner
Henri L. Wedell
Charles I. Wellborn
Earl D. Whittemore
Marvel Wilson, Jr.
Herbert N. Zack
Shirley R. Zaid
William T. Zanoni
Wilson M. Zildjian

APPENDIX B

APPENDIX B

RESPONDENTS

THE CORPORATION OF LLOYD'S
a/k/a THE SOCIETY AND COUNCIL OF LLOYD'S
d/b/a LLOYD'S OF LONDON

The Governing Body Defendants
(and Their Individual Internal Members):

THE COUNCIL OF LLOYD'S
THE COMMITTEE OF LLOYD'S
Simon Arnold
Michael Cockell
David Coleridge
Peter Daniels
Henry Dobinson
John Greig
Richard Hazell
Anthony Hines
Gordon Hutton
Alan Jackson
Bryan Kellett
Robert Keville
Murray Lawrence
Alan Lord
Stephen Merrett
Peter Miller
Colin Murray
Alan Parry
David Rowland
Michael Wade
Philip Wroughton

The Member's Agents Defendants
(and Their Respective Chairs of the Board):

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J.B. Marshall,
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JANSON GREEN LTD. WETHERELL NON-MARINE DIVISION,
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WELLINGTON UNDERWRITING AGENCIES LTD.,
J.O. Prentice,
WENDOVER UNDERWRITING AGENCY LTD.,
A.D. Shead,
WREN SYNDICATE MANAGEMENT LTD.,
N.C. Haydon,

The Syndicate Defendants:

SYNDICATE 2, 10, 15, 17, 28, 31, 33, 37, 40, 47, 48, 51, 52, 53, 62, 65, 79, 80, 97, 102, 103, 104, 105, 108, 109, 112, 122, 123, 138, 144, 153, 156, 162, 164, 179, 182, 183, 185, 190, 197, 203, 204, 205, 206, 207, 209, 210, 212, 216, 218, 219, 225, 227, 228, 229, 234, 235, 253, 254, 255, 256, 257, 264, 270, 271, 272, 282, 288, 290, 293, 295, 296, 298, 299, 304, 305, 309, 310, 314, 317, 318, 319, 321, 322, 323, 329, 330, 331, 332, 340, 342, 349, 350, 362, 363, 366, 367, 370, 375, 376, 382, 384, 386, 387, 388, 396, 397, 401, 404, 406, 417, 418, 421, 428, 435, 437, 439, 445, 448, 454, 456, 457, 463, 469, 471, 475, 483, 484, 488, 490, 498, 500, 503, 505, 506, 508, 509, 510, 512, 527, 529, 530, 535, 536, 540, 542, 544, 545, 546, 552, 554, 557, 560, 561, 566, 570, 573, 575, 577, 582, 584, 588, 601, 602, 603, 604, 609, 613, 623, 625, 633, 635, 636, 648, 657, 658, 660, 661, 662, 674, 685, 694, 697, 702, 711, 718, 724, 726, 727, 732, 733, 735, 740, 741, 744, 745, 760, 764, 780, 782, 785, 787, 794, 799, 800, 803, 807, 808, 816, 820, 824, 831, 833, 836, 839, 843, 847, 850, 851, 860, 861, 866, 868, 872, 877, 887, 892, 896, 901, 904, 907, 913, 919, 920, 923, 925, 926, 929, 932, 939, 942, 947, 950, 955, 957, 958, 959, 960, 963, 965, 979, 980, 982, 989, 994, 998, 1001, 1002, 1003, 1005, 1006, 1007, 1009, 1011, 1014, 1019, 1021, 1023, 1025, 1027, 1028, 1034, 1035, 1036, 1038, 1041, 1046, 1048, 1049, 1052, 1058, 1066, 1067, 1068, 1069, 1079, 1083, 1084, 1085, 1086, 1087, 1091, 1093, 1095, 1096, 1097, 1098, 1101, 1102, 1104, 1105, 1112, 1114, 1117, 1118, 1122, 1125, 1129, 1137, 1139, 1141, 1143, 1144, 1145, 1148, 1151, 1152, 1153, 1156, 1158, 1162, 1163, 1171, 1173, 1176, 1179, 1181, 1182, 1184 **AT LLOYD'S OF LONDON**

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 870—August Term, 1992

(Argued February 5, 1993 Decided June 2, 1993)

Docket No. 92-9032

JOHN S. ROBY; SUSAN B. BOLIN; AMANDA A. BRYAN; ANNE L. BRYAN; FLORENCE E. BRYAN; JOHN M. BRYAN; SUZANNE E. BRYAN; ROBERT S. CLARKE; PATRICK J. COLLINS; DANIEL F. COUGHLIN; ROBERT L. COX; JOHN D. DIVER; ALBERT W. DUGAN; LEE R. ELLENBURG; JULES I. EPSTEIN; TILLMAN R. FESPERMAN; MARTHA H. FOGELMAN; ROBERT F. FOGELMAN; ROBERT S. FORMAN; LEONARD FRIEDMAN; MARVIN GOODSON; ANDREW GROSSMAN; KATHRYN B. HAMPTON; ALTON B. HARRIS; MICHAEL C. HARTLEY; CAROL M. HATHAWAY; JEROME E. HICKEY; ALAN J. HUNKEN; DALE A. JENKINS; ROBERT B. KING; RICHARD J. KISSEL; RAYMOND C. LEE; JANIS L. MACMILLAM; J. STEVEN MARKS; MARY L. MARKS; JAMES L. MCCORMICK; NORMAN N. MINTZ; CHARLES E. MORRIS; ALVIN B. MOSS; WILLIAM B. MURRAY; MARGARET W. NICHOL; ROSEMARY H. PASEK; JOSEPH N. PATTISON; CHARLES F. ROBINSON; JOHN N. ROBINSON; JOE R. ROBY; HERBERT A. RUBIN; JACOB A. RUBIN; ROBERT W. RUDER; CONSTANTINE SALONITIS; ARTHUR SCHECHNER; CHARLES SCHNAID; LOUIS B. SCHOEN; K. DINO SIRAKIDES; JOEL M. SPIRO; GILCHRIST B. STOCKTON, JR.; WILLIAM N. STOUT; KENNETH M. TAYLOR; MARVEL WILSON, JR.; HENRI L. WEDELL; CHARLES I. WELLBORN; WILLIAM T. ZANONI; ROGER ANDERSON; CHARLES G. BENTZIN; PETER A. BENZ;

THORTON COOKE; DONALD D. DECENSO; MARCO DILAURENTI; LYDIA P. DUGAN; ROBERT E. EAKIN; KAROLE E. GLASER; OLIVER R. GRACE, SR.; JACK D. GRAY; A. CARY HARRISON, III; SIDNEY KAHN; AUDREY W. KATZ; ROBERT P. KEITH; ALAN W. KRAL; JAMES E. KRAUSE; NANCY KURZ; PAUL W. MCMULLAN; HENRY A. MITCHELL, JR.; KATHERINE S. NORDHAUS; CHARLES W. OLSON; JAMES J. O'SULLIVAN, JR.; LIBBY B. POHORYLES; ANTHONY B. SOSKIN; HERMAN G. STURMAN; ALYSON WARNER; EARL D. WHITTEMORE; HERBERT N. ZACK; JOHN H. ABELES; ALBERT B. CRUTCHER, JR.; JAMES S. DEELY; STEPHEN E. DELASZLO; DAVID DOLGENOS; LINDA TUFTS HEBBLER; ROGER W. HOUSE; CHARLES A. JANDA; JEANNE LONG; CHARLES A. MALKEMUS; ANDREW H. MARKS; ALLISON MERCER; MARTHA LONG NAVARRO; GREGORY J. SALKO; ROBERT G. SIMS; FREDERICK E. SMITHLINE; JAMES D. TUFTS, II; JAMES D. TUFTS, III; SHIRLEY R. ZAID; WILSON M. ZILDJIAN,

Plaintiffs-Appellants,

v.

CORPORATION OF LLOYD'S, also known as Society & Council of Lloyd's, doing business as Lloyd's of London; COUNCIL OF LLOYD'S; COMMITTEE OF LLOYD'S; SIMON ARNOLD; MICHAEL COCKELL; DAVID COLERIDGE; PETER DANIELS; HENRY DOBINSON; JOHN GREIG; RICHARD HAZELL; ANTHONY HINES; GORDON HUTTON; ALAN JACKSON; BRYAN KELLETT; MURRAY LAWRENCE; ALAN LORD; STEPHEN MERRETT; PETER MILLER; COLIN MURRAY; ALAN PARRY; DAVID ROWLAND; MICHAEL WADE; BANKSIDE MEMBERS AGENCY LTD.; D.E. BIGGS; BPC MEMBERS AGENCY LTD.; C.L. JACKSON; FENCHURCH UNDERWRITING AGENCIES LTD.; C.A.G. KEELING; GARDNER MOUNTAIN & CAPEL CURE AGENCIES LTD.; J.G. HOGG; GOODA & PARTNERS LTD.; A.W. GOODA; JARDINE LTD.; D.R. WALKER; J.H. DAVIES UNDERWRITING AGENCY LTD.; J.H. DAVIES; LONDON WALL MEMBERS AGENCY LTD.; NELSON HURST & MARSH AGENCIES LTD.; B.P.

MARSH; 0CTAVIAN UNDERWRITING LTD.; J.R.T. CHURCH; PW KININMONTH LTD.; R.W. STURGE LTD.; C.E. PARNELL; SECRETAN UNDERWRITING AGENCIES LTD.; A.D. PILCHER; SEDGEWICK LLOYD'S UNDERWRITING AGENCIES LTD.; J.M. GORDON; THOS R. MILLER & SON UNDERWRITING AGENTS LTD.; PETER MILLER; WILLIS, FABER & DUMAN, AGENCIES LTD.; J.N.W. WOODERSON; ANTON MANAGING AGENCY LTD.; S.R. MERRETT; AJ ARCHER & CO. LTD.; A.J. ARCHER; BANKSIDE SYNDICATES LTD.; E.E. PATRICK; BARDER & MARSH; J.H. BARDER; BCP UNDERWRITING AGENCIES LTD.; C.L. JACKSON; CATER ALLEN UNDERWRITING AGENCY LTD.; B.F. CAUDLE AGENCIES LTD.; B.F. CAUDLE; CHARNAM UNDERWRITING AGENCIES LTD.; J.R. CHARNAM; H.G. CHESTER & CO. LTD.; R.J. MARTIN; CHRISTOPHERSON HEATH LTD.; R.E. HEATH; CLAREMOUNT UNDERWRITING AGENCY LTD.; J.W. OAKES; COX, NEWMAN & HARMAN LTD.; D.E. HARMAN; CUTHBERT, HEATH UNDERWRITING LTD.; J.W. PRYKE; JH DAVIES UNDERWRITING AGENCY LTD.; J.H. DAVIES; DEVONSHIRE UNDERWRITING AGENCY LTD.; P.W.G. SUTTLE; NT EVENNETT & PARTNERS LTD.; N.T. EVENNETT; FELTRIM UA LTD.; P.F. FAGAN; GOODA WALKER LTD.; A.W. GOODA; GRESHAM UA LTD.; T.G. GREEN; JOHNSON GREENE LTD., MARINE/AVIATION SYNDICATES DIV.; G.R.P.N. VALENTINE; J.R.L. YOUELL; HEXAD PARTNERSHIP; MARQUEES OF DOWNSHIRE; G.W. HUTTON & CO. LTD.; G.W. HUTTON; BPD KELLETT & CO. LTD.; BPD KELLETT; LONDON WALL MANAGING AGENCIES; R.H. WARRENDER; LONDON RIVER UNDERWRITING MANAGEMENT LTD.; J.M. POLAND; MERRETT SYNDICATES LTD.; J.R. ROBSON; MURRAY LAWRENCE & PARTNERS LTD.; W.N.M. LAWRENCE; D.M. HOLMAN; OCTAVIAN SYNDICATE MANAGEMENT LTD.; D.E. COLERIDGE; R.M. PATEMAN; R.M. PATEMAN UNDERWRITING AGENCIES LTD.; PETER PEPPER LTD.; P.L. PEPPER; JOHN POLAND LTD.; T.M. BRADLEY; RD UNDERWRITING AGENCIES LTD.; J.M. DONNER; C.W. ROME UNDERWRITING AGENCIES LTD.; C.W. ROME; ROSE, THOMPSON, YOUNG LTD.; L.R. SAWYER LTD.; FLP

SECRETAN & CO. LTD.; A.D. PILCHER; STREET LTD.; C.K. MURRAY; STURGE MARINE SYNDICATE MANAGEMENT LTD.; B.E. BEAGLEY; WELLINGTON UNDERWRITING AGENCIES LTD.; J.O. PRENTICE; WENDOVER UNDERWRITING AGENCY LTD.; A.D. SHEAD; ALEXANDER HOWDEN & BECK LTD.; P.M. GRAHAM; D.T. CAREY; CATER ALLEN MEMBERS AGENCY; D.J. WHITE; CHILTREN UNDERWRITING AGENCIES LTD.; N.A. LEWIS; HARRISON BROTHERS (U/A) LTD.; D.B.K. HARRISON; JARDINE (LLOYD'S UNDERWRITING AGENTS) 1990 LTD.; KINGSLEY UNDERWRITING AGENCIES LTD.; R.C. KINGSLEY; R.C. HALLAM; LIME STREET UNDERWRITING AGENCIES LTD.; RAF MACMILLAN & CO.; M.A. BRECKNELL; RAF MACMILLAN; MOCATTA DASHWOOD MEMBERS AGENTS LTD.; F. DASHWOOD; MURRAY LAWRENCE MEMBERS AGENCY; W.N.M. LAWRENCE; P.W. KININMONTH; ROSE THOMSON YOUNG (UNDERWRITING) LTD.; D.H.H. MEACOCK; SCOTT UNDERWRITING AGENCIES LTD.; G.W. SCOTT; VANGUARD UNDERWRITING AGENCIES, LTD.; T.J. PEPPER; KC WEBB (UNDERWRITING) LTD.; J.G. HOGG; ARAGORN AGENCIES LTD.; A.J.W.F. WALLACE; AUSTIN CAUDLE (U/A) LTD.; B.F. CAUDLE; GUEST BARNES (UNDERWRITING AGENCIES) LTD.; BIRRELL SMITH UNDERWRITING AGENCIES LTD.; CATER ALLEN SYNDICATE MANAGEMENT LTD.; EDWARD & PAYNE (UNDERWRITING AGENCIES) LTD.; C.H.A. SKEY; JANSON GREEN LTD.; WETHERELL NON-MARINE DIVISION; G.R.P.N. VALENTINE; J.M.W.P. WETHERELL; B.P.D. KELLETT; RJ KILN & CO. LTD.; KPH UNDERWRITING AGENCIES LTD.; D.G. KING; MARK LOVEDAY UNDERWRITING AGENCIES LTD.; MERRETT UNDERWRITING AGENCY MANAGEMENT LTD.; NEWGREEN UNDERWRITING AGENCIES LTD.; J.R.T. CHURCH; OXFORD SYNDICATE MANAGEMENT LTD.; ROBERTS & HISCOX LTD.; R.R.S. HISCOX; RD ROBERTSON UNDERWRITING AGENCY LTD.; L.R. SAWYER; THREE QUAYS UNDERWRITING MANAGEMENT LTD.; ROBERT KEVILLE; PHILIP WROUGHTON; J.B. MARSHALL; CUTHBERT HEATH MEMBERS AGENCY LTD.; D. HAZELWOOD; DONNER UNDERWRITING AGENCIES LTD.;

J.G. CURTIS; KILN MEMBERS AGENCY LTD.; D.L. DANN; W.S. STRATHALMOND; SCOTT CAUDLE HILSUM LTD.; J.D. SCOTT; CASSIDY DAVIS UNDERWRITING LTD.; D.A. PEASE; CUTLER UNDERWRITING AGENCIES LTD.; D.E. DOWLEN; GRAVETT & TILLING (UNDERWRITING AGENCIES) LTD.; M.A. GRAVETT; HOLMES HAYDAY (UNDERWRITING AGENCIES) LTD.; T.J. HAYDAY; KNIGHTSTONE (MANAGING AGENCY) LTD.; G. COOPER; MANDER THOMAS & COOPER (UNDERWRITING AGENTS) LTD.; C.J. MANDER; MFK UNDERWRITING AGENCY LTD.; M.C. WATKINS; MIS UNDERWRITING AGENCY LTD.; RHM OUTHWAITE (UNDERWRITING AGENCIES) LTD.; LORD HAVERS; STEWART & HUGHMAN LTD.; D.C. CRAIG; VENTON UNDERWRITING AGENCIES LTD.; R.N. ALWEN; WREN SYNDICATE MANAGEMENT LTD.; N.C. HAYDON; SYNDICATES-2, 10, 15, 17, 28, 31, 33, 37, 40, 47, 48, 51, 52, 53, 62, 65, 79, 80, 97, 102, 103, 104, 105, 108, 109, 112, 122, 123, 138, 144, 153, 156, 162, 164, 179, 182, 183, 185, 190, 197, 203, 204, 205, 206, 207, 209, 210, 212, 216, 218, 219, 225, 227, 228, 229, 234, 235, 253, 254, 255, 256, 257, 264, 270, 271, 272, 282, 288, 290, 293, 295, 296, 298, 299, 304, 305, 309, 310, 314, 317, 318, 319, 321, 322, 323, 329, 330, 331, 332, 340, 342, 349, 350, 362, 363, 366, 370, 375, 376, 397, 382, 384, 386, 387, 388, 396, 397, 401, 404, 406, 417, 418, 421, 428, 435, 437, 439, 445, 448, 454, 456, 457, 463, 469, 471, 483, 484, 488, 490, 498, 500, 503, 505, 506, 508, 509, 510, 512, 527, 529, 530, 535, 536, 540, 542, 544, 545, 546, 552, 554, 557, 560, 561, 566, 570, 573, 575, 577, 582, 584, 588, 601, 602, 603, 604, 609, 613, 623, 625, 633, 635, 636, 648, 657, 658, 660, 661, 662, 674, 685, 694, 697, 702, 711, 718, 724, 726, 727, 732, 733, 735, 740, 741, 744, 745, 760, 764, 780, 782, 785, 787, 794, 799, 800, 803, 807, 808, 816, 820, 824, 831, 833, 836, 839, 843, 847, 850, 851, 860, 861, 866, 868, 872, 877, 887, 892, 896, 901, 904, 907, 913, 919, 920, 923, 925, 926, 929, 932, 939, 942, 947, 950, 955, 957, 958, 959, 960, 963, 965, 979, 980, 982, 989, 994, 998, 1001, 1002, 1003, 1005, 1006, 1007, 1009, 1011, 1014, 1019, 1021, 1023, 1025, 1027, 1028, 1034, 1035, 1036, 1038, 1041, 1046, 1048, 1049, 1052, 1058, 1066, 1067, 1068, 1069, 1079, 1083, 1084, 1085, 1086, 1087, 1091, 1093, 1095, 1096, 1097, 1098, 1101, 1102, 1104, 1105, 1112, 1114, 1117, 1118, 1122,

1125, 1129, 1137, 1139, 1141, 1143, 1144, 1145, 1148, 1151, 1152, 1153, 1156, 1158, 1162, 1163, 1171, 1173, 1176, 1179, 1181, 1182, 1184, AT LLOYD'S OF LONDON,

Defendants-Appellees.

SUBSEQUENT HISTORY: [*1] As Amended July 7, 1993.

PRIOR HISTORY: Appeal from an order dated June 12, 1992 entered in the United States District Court for the Southern District of New York, Lasker, *J.*, that dismissed appellants' complaint against the so-called syndicate defendants on the ground that they lacked legal existence and from a judgment of that court dated August 25, 1992 that dismissed the complaint against the other defendants for improper venue.

DISPOSITION: We affirm.

COUNSEL: DALE A. SCHREIBER, New York City (Minna Schrag, Steven B. Feigenbaum, Adrienne B. Koch, Proskauer Rose Goetz & Mendelsohn, New York City, of counsel), *for Appellants.*

TAYLOR R. BRIGGS, New York City (Sheila H. Marshall, LeBoeuf, Lamb, Leiby & MacRae, New York City, of counsel), *for Appellees The Society, Corporation, Committee and Council of Lloyd's and their individual Internal Members.* JONATHAN C. THAU, New York City (Thomas W. Wilson, Nicholas J. Conca, Fred N. Knopf, Wilson, Elser, Moskowitz, Edelman & Dicker, New York City, of counsel), *for Appellees The Members' Agents.* WILLIAM A. MEEHAN, New York City (Daniel M. Bianca, Leo W. Fraser, III, Jeff Imeri, Karen Wallace, Mendes & Mount, New York City, of counsel), *for Appellees The "Managing Agent Defendants".* CHARLES A. GILMAN, [*2] New York City (Robert A. Alessi, Marcy A. Siskind, Cahill Gordon & Reindel, New York City, of counsel), *for Appellees The So-Called "Syndicate Defendants".*

JUDGES: Before: MESKILL, *Chief Judge* FEINBERG and WINTER, *Circuit Judges*.

OPINION BY: MESKILL

OPINION:
MESKILL, *Chief Judge*:

Appellants, all American citizens or residents, are more than one hundred "Names" in the Corporation of Lloyd's (Lloyd's). Loosely speaking, Names are investors in Lloyd's syndicates, the entities that nominally underwrite insurance risk. For convenience we will refer to the syndicates as entities; although this is a disputed issue on appeal, we affirm on a different basis and therefore need not resolve this issue. Appellant Names (Roby Names) alleged in their consolidated complaint that they have suffered severe financial loss as a result of appellees' violations of the Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (the Securities Act), the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*ll* (the Securities Exchange Act), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 *et seq.* (RICO). [*3] This opinion, however, addresses only the Roby Names' contention on appeal that their disputes with Lloyd's and Lloyd's entities should be litigated in the United States despite a host of contract clauses that appear to bind them to arbitrate in England under English law. The district court held that those contract clauses must be enforced and therefore dismissed the Roby Names' complaint for improper venue. The Roby Names contend that the district court erred because (1) the clauses by their very terms do not protect certain defendants and do not cover the substance of appellants' complaints, and (2) the clauses are unenforceable because they effectively waive compliance with the United States securities laws, contrary to the antiwaiver provisions of those laws and the public policy reflected by them. To understand why we disagree with the Roby Names' arguments it is necessary to understand the structure and operations of Lloyd's, which we discuss in some detail.

BACKGROUND

Lloyd's is not a company; it is a market somewhat analogous to the New York Stock Exchange. Lloyd's' governing bodies, the Council and Committee of Lloyd's, promulgate regulations and enforce compliance therewith. [*4] There are over 300 syndicates competing within Lloyd's for underwriting business, each managed by an entity called a Managing Agent. Each Managing Agent is responsible for its own syndicate's financial well-being; it tries to attract capital and underwriting business. Managing Agents owe a contractual duty to Names to manage their syndicates with reasonable care and skill. Capital comes from Names, who are represented in their dealings with Lloyd's by Members' Agents (also entities). Members' Agents are obliged to act in the sole interest of their principal Names. By agreement, the Members' Agents stand in a fiduciary relationship to their Names. Lloyd's brokers broker underwriting risk to the syndicates by negotiating with the syndicates' Active Underwriters, individuals appointed by the syndicates' Managing Agents. Brokers, Managing Agents, and Members' Agents all compete with their peers in their respective areas.

While eighty percent of Lloyd's 26,000 Names are English, about 2,500, representing more than $ 1 billion in capital, are American. The Roby Names were solicited in the United States by various Lloyd's entities and representatives. Except for a brief meeting in London--a [*5] mandatory formality--the entire process by which the Roby Names became Names took place in the United States. In order to become a Name, an individual had to pass a "means test." The Roby Names assert that in 1988, by which time they had all become Names, this test required prospective Names to maintain a net worth of approximately $ 170,000. By contrast, Lloyd's claims that Names were required to demonstrate that they were "accredited investors" under Regulation D, 17 C.F.R. § 230.501(a) (1992), so that any sale of securities to them would be exempt from the registration requirements of the Securities Act. *See* 15 U.S.C. § 77d(2); 17 C.F.R. § 230.506(b) (1992). While there is evidence that this requirement was established after 1988, Lloyd's has not pointed to any proof that the requirement was in effect prior to 1988. Nevertheless, the Securities and Exchange

Commission (SEC) has never insisted that Lloyd's or Lloyd's entities register securities.

Upon becoming a Name, an individual selects from a list of syndicates--with the aid of only very limited financial information--and decides how much he wishes to invest in each one. In making these [*6] decisions, Names rely to a great extent on the advice of their Members' Agents. The profits that Names earn are in proportion to their capital contributions, and Names bear unlimited liability for their proportionate losses in each syndicate they join. Their liability is several, not joint; no Name is ever responsible for the losses of those fellow Names who comprise the syndicate.

Names are required to enter directly into two agreements and indirectly into two others.[1] The "General Undertaking" is between a Name and the Lloyd's' governing bodies and contains choice of forum (England) and choice of law (English) clauses. This undertaking does not contain an arbitration clause. The "Members' Agent's Agreement" is between a Name and his Members' Agent and also contains choice of forum (England), arbitration and choice of law (English) clauses. The Members' Agent's Agreements specifically authorize the Members' Agents to enter into a third agreement on behalf of the Names, called the "Managing Agent's Agreement." This agreement, not signed by the Names themselves, and apparently often not even signed by the Managing Agents, defines the rights and obligations of the Managing Agent of [*7] a syndicate and that syndicate's Names, and also contains choice of forum (England), arbitration and choice of law (English) clauses. In turn, the Managing Agent's Agreement authorizes the Managing Agents to enter, on behalf of themselves, the Names and the Members' Agents, into a "Syndicate and Arbitration Agreement" which requires disputes

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[1] A slightly different structure existed prior to 1990, but the differences are irrelevant for purposes of this appeal and affect at most only five of the 109 appellants.

related to the affairs of the particular syndicate to be arbitrated in London.

In their consolidated complaint, the Roby Names allege violations of sections 12(1) and 12(2) of the Securities Act, 15 U.S.C. § 771(1), (2), and section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b). In addition, they allege "controlling person" liability under section 15 of the Securities Act, 15 U.S.C. § 77o, [*8] and section 20 of the Securities Exchange Act, 15 U.S.C. § 78t. Finally, using these securities law violations as predicate acts, the Roby Names allege several violations of RICO. Each cause of action names as defendants a different combination of the following parties: Lloyd's, Lloyd's' governing bodies, certain Managing and Members' Agents, certain individual members of these entities (the Chairs), and certain syndicates.

By order dated June 12, 1992, Judge Lasker dismissed the complaint against the "syndicate defendants," finding that they had no separate existence and therefore could not be sued as entities. By subsequent order dated August 18, 1992, the judge found that the interlocking set of agreements bound the Roby Names to arbitrate or litigate their disputes in London and dismissed the complaint in its entirety for improper venue. A judgment dated August 25, 1992 was entered to this effect. The Roby Names appeal from the June 12th order and the August 25th judgment.

DISCUSSION

The Roby Names maintain that their investments in Lloyd's syndicates constitute "securities" under the securities laws. We decline to rule on this question today, [*9] noting only that we have received little guidance from the SEC on this issue. Instead, we will assume for purposes of this appeal that the Roby Names' consolidated complaint states cognizable claims under the securities laws. For the sake of precision, we note that the assumed sale of a security occurs not when an individual *becomes* a Name, but instead when a Name *pledges capital* to a syndicate. Nevertheless, we understand the Roby Names to argue that the *solicitation* of

individuals to become Names is in fact part of the overall process of soliciting them to pledge capital (i.e., to buy "securities").

The Roby Names present us with two basic arguments as to why these suits should be litigated in the United States: (1) the contract clauses, by their terms, apply neither to the substance of their claims nor to certain defendants; and (2) the clauses are unenforceable due to the public policy codified in the securities laws. We find neither of these arguments persuasive.

I. *Scope of the Contract Clauses*

A. *Parties Covered*

We believe every defendant in this action, in the words of Judge Lasker, is either "protected directly by the [contract] clauses or [is [*10] an] intended beneficiar[y] entitled to enforce them." *Roby v. The Corporation of Lloyd's*, No. 91 Civ. 7081, 1992 U.S. Dist. LEXIS 12367, at *14 (S.D.N.Y. Sept. 3, 1992, as amended). We reject, therefore, the Roby Names' arguments that neither the syndicates, the Managing Agents nor the individual Chairs of the Managing and Members' Agents may assert the protection of these clauses.

1. *Syndicates*

Judge Lasker dismissed the Roby Names' action against the syndicates on the ground that they had no entity existence. Although the Roby Names dispute this legal determination, we need not decide the issue because we may of course affirm the judgment of the district court on any basis that has support in the record. *See I. Meyer Pincus & Assocs. v. Oppenheimer & Co.*, 936 F.2d 759, 761 (2d Cir. 1991). Consequently, even if we assume the syndicates do have entity existence, we would affirm their dismissal on the basis of improper venue.

Paragraph 2.2 of the General Undertaking states, in pertinent part:

Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute [*11] and/or controversy of whatsoever nature arising out of or relating to the [Name's] membership of, and/or underwriting of insurance business at, Lloyd's.

Paragraph 2.1 is equally broad and provides for the application of English law. The syndicates are third-party beneficiaries of this agreement. As Professor Corbin has said, a third party will have an enforceable right "if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract." 4 Arthur L. Corbin, *Corbin on Contracts* @ 776, at 18 (3d ed. 1967). Here, the syndicates have a pecuniary interest in the certainty and consistency of litigating in one nation's courts under one nation's laws. The extremely broad language of the General Undertaking should make it clear that Lloyd's' intent was to benefit all Lloyd's entities, particularly because potential actions against Lloyd's itself are limited in nature and the broad language of paragraphs 2.1 and 2.2 otherwise would be sorely *over*broad. Moreover, paragraph 1, which is the only other substantive [*12] provision in the General Undertaking, requires Names to abide by the provisions of any other contract authorized by the Council (including, *e.g.*, the Members' Agent's Agreement). We believe this indicates that the General Undertaking was meant to govern the Names' general obligations within the entire Lloyd's community.

As a fallback position, the Roby Names rightly observe that Judge Lasker refused to issue an order confirming that his decision dismissing the action against the other defendants for improper venue applied equally to the syndicate defendants. However, the judge offered no explanation for his refusal and we believe he was simply exercising cautious restraint rather than definitively ruling that the improper venue decision did not apply to the syndicates. Because we believe the reasoning of the venue decision is equally applicable to the syndicate defendants, we hold that the syndicates,

if they are entities, are also entitled to the benefits of the forum selection and choice of law clauses.

The General Undertaking contains no arbitration clause, and therefore we do not decide today whether the Roby Names are bound to arbitrate with the syndicates. Whether the [*13] Syndicate and Arbitration Agreement or some other agreement may be interpreted to require the Roby Names to arbitrate is a question that should be decided under English law in an English court pursuant to the General Undertaking.

2. *Managing Agents*

The Roby Names contend that they are not bound by the Managing Agent's Agreements because neither they nor the Managing Agents ever signed them. However, the parties clearly assented to be bound by the Managing Agent's Agreements. First, the Roby Names signed the Members' Agent's Agreements which authorize their Members' Agents to enter into Managing Agent's Agreements on their behalf. Second, they signed the General Undertaking which requires them to abide by all of Lloyd's bylaws. Bylaw 8 prohibits any Name from underwriting insurance at Lloyd's other than pursuant to the standard agreements. By underwriting insurance, the Roby Names have demonstrated their intent to be bound by the Managing Agent's Agreements. Similarly, the Managing Agents, by acting in their capacity in accordance with the web of standard agreements, clearly have demonstrated their intent to abide by the provisions of the Managing Agent's Agreements.

3. *Individual [*14] Chairs*

The Roby Names next contend that the individual Chairs of the Members' and Managing Agents are neither signatories to nor third-party beneficiaries of any agreement with the Roby Names and therefore that they must litigate in federal court. We agree with the district court, however, that the individual Chairs are entitled to rely on the contract clauses incorporated into their employers' agreements.

Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement. *See, e.g., Scher v. Bear Stearns & Co.*, 723 F. Supp. 211, 216-17 (S.D.N.Y. 1989); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 451 (S.D.N.Y. 1985); *Nesslage v. York Securities, Inc.*, 823 F.2d 231, 233-34 (8th Cir. 1987). The Roby Names argue that, unlike those cases, the complaints against the individual Chairs are distinct from those against their employers. They contend that the Chairs have not been sued for acts carried out on behalf of the Members' and Managing Agents (Agents) or in violation of the [*15] Agents' contractual obligations to the Roby Names. Instead, they have been sued as "controlling persons" under the securities laws.

We believe that this is a distinction without a legal difference. The complaints against the individual Chairs are completely dependent on the complaints against the Agents. Whether the individual Chairs are disclosed agents or controlling persons, their liability arises out of the same misconduct charged against the Agents. If the scope of the Agents' agreements includes the Agents' misconduct, it necessarily includes the Chairs' derivative misconduct. Moreover, we believe that the parties fully intended to protect the individual Chairs to the extent they are charged with misconduct within the scope of the agreements. If it were otherwise, it would be too easy to circumvent the agreements by naming individuals as defendants instead of the entity Agents themselves.

B. *Disputes Covered*

"[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986). The Roby Names contend essentially that [*16] the forum selection and arbitration clauses apply only to disputes arising from the conduct of the defendants as managers, representatives or regulators. Because this conduct can occur only *after* the "securities" have

been sold, the Roby Names claim that they did not agree to arbitration of, or English jurisdiction over, complaints pertaining to the sale of those "securities." They present two basic arguments: (1) because the choice of law clauses require the application of English law, the Roby Names' United States statutory claims cannot possibly be covered under the agreements, and (2) resolution of their claims does not require the construction of the agreements because the Roby Names have not alleged any breach of contract, and the language of the arbitration and forum selection clauses is not broad enough to cover their claims. We reject both arguments.

1. *Application of English Law*

It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of *his country's* tort law or *his country's* statutory [*17] law or *his country's* property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading. *See Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S. Ct. 349, 78 L. Ed. 2d 315 (1983). In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.

2. *Scope of the Agreements*

Of course, the Roby Names are quite right that if the substance of their claims, stripped of their labels, does not fall within the scope of the clauses, the clauses cannot apply. However, they must make this argument in the face of strong public policy in favor of forum selection and arbitration clauses. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985);

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972). [*18] Indeed, an order to arbitrate "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

There is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses. The Managing and Members' Agent's Agreements speak, with respect to the arbitration clauses, in terms of "dispute[s], difference[s], question[s] or claim[s] *relating to*" the agreements and, with respect to the forum selection clauses, in terms of submission for "all purposes of and *in connection with*" the agreements (emphasis added). In *Bense v. Interstate Battery System of America*, 683 F.2d 718, 720 (2d Cir. 1982), we held that a forum selection clause that applied to "causes of action arising directly or indirectly from [the agreement]" covered federal antitrust actions. Similarly, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449, *reh'g [*19] denied*, 419 U.S. 885, 95 S. Ct. 157, 42 L. Ed. 2d 129 (1974), held that controversies and claims "arising out of" a contract for the sale of a business covered securities violations related to that sale. *Id.* at 519-20. We find no substantive difference in the present context between the phrases "relating to," "in connection with" or "arising from." We therefore reject the Roby Names' contention that only allegations of contractual violations fall within the scope of the clauses.

In the instant case the conduct surrounding the underwriting activities at Lloyd's is integrally related to the sale of Lloyd's "securities" because the "security" is essentially equivalent to the underwriting of risk or the pledging of capital. In order to underwrite risk, a Name is required by Lloyd's' bylaws to enter into the Managing and Members' Agent's Agreements. He may not underwrite risk otherwise; that is, he may not "buy the security" otherwise. Misconduct with respect to the sale of these "securities" necessarily "relates to" these required agreements.

It is perhaps even more persuasive that the agreements are in fact not limited to the conduct of business but also [*20] cover the raising of capital. Thus, for instance, the agreements contain certain disclosure requirements. In addition, they establish certain duties of the Agents with respect to the Name and because the agreements are entered into *prior* to the underwriting of risk, these duties are owed with respect to the raising of capital. We believe the agreements are clearly intended to, and in fact do, govern the relationships between Agents and Names with respect to the purchase and sale of Lloyd's "securities." Because the gist of the Roby Names' allegations relates to the sale of those "securities," we hold that their claims "relate to" the Agent's Agreements.

Similarly, and even more forcefully, the broad language of the forum selection clause of the General Undertaking covers the Roby Names' claims at least against Lloyd's' governing bodies. Those claims are undoubtedly related to the Roby Names' "membership of, and/or underwriting of insurance business at, Lloyd's."

II. *Application of the Securities Laws*

The Roby Names argue that the public policy codified in the antiwaiver provisions of the securities laws renders unenforceable any agreement that effectively eliminates compliance [*21] with those laws. The Securities Act provides that "[a]ny . . . stipulation . . . binding any person acquiring any security to waive compliance with any provision of this subchapter . . . shall be void." 15 U.S.C. § 77n. Similarly, the Securities Exchange Act states, "any . . . stipulation . . . binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . . shall be void." 15 U.S.C. § 78cc(a). According to the undisputed testimony of a British attorney, neither an English court nor an English arbitrator would apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law. From this, the Roby Names conclude that the contract clauses work to waive compliance with the securities laws and therefore are void.

We note at the outset that *Wilko v. Swan*, 346 U.S. 427, 98 L. Ed. 168, 74 S. Ct. 182 (1953), has been squarely overruled. *See Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989); *see also Shearson/American Express v. McMahon*, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332, [*22] *reh'g denied*, 483 U.S. 1056, 97 L. Ed. 2d 819, 108 S. Ct. 31 (1987) (asserting that the assumptions underlying *Wilko* are no longer valid). *Wilko* held that an agreement to arbitrate future controversies was void under the antiwaiver provision of the Securities Act. We do not doubt that judicial hostility to arbitration has receded dramatically since 1953 and that the arbitral forum is perfectly competent to protect litigants' substantive rights. In the words of the *Mitsubishi* Court, quoted by both the *Rodriguez* and *McMahon* Courts, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628. If the Roby Names objected merely to the choice of an arbitral rather than a judicial forum, we would reject their claim immediately, citing *Rodriguez* and *McMahon*. However, the Roby Names argue that they have been forced to forgo the *substantive* protections afforded by the securities laws, not simply the judicial forum. We therefore do not believe that *Rodriguez* and *McMahon* are controlling [*23] and must look elsewhere to determine whether parties may contract away their substantive rights under the securities laws.

The Tenth Circuit recently addressed this exact issue in a similar context in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 121 L. Ed. 2d 584, 113 S. Ct. 658 (1992). Relying primarily on four Supreme Court precedents, *Carnival Cruise Lines v. Shute*, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991); *Mitsubishi*, 473 U.S. at 614; *Scherk*, 417 U.S. at 506; *The Bremen*, 407 U.S. at 1, the *Riley Court* concluded that "[w]hen an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect." 969 F.2d at 957; *see also Bonny v. Society of Lloyd's*, 784 F. Supp. 1350,

1353 (N.D. Ill. 1992) (drawing the same conclusion). While we agree with the ultimate result in *Riley*, we are [*24] reluctant to interpret the Supreme Court's precedent quite so broadly.

A. *Presumption of Validity*

The Supreme Court certainly has indicated that forum selection and choice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character. *See, e.g., The Bremen*, 407 U.S. at 15.[2] In *The Bremen*, the Court explained that American parochialism would hinder the expansion of American business and trade, and more generally, interfere with the smooth functioning and growth of global commerce. *Id.* at 9. Forum selection and choice of law clauses eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws. Moreover, international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals. *See Mitsubishi*, 473 U.S. at 629. In addition to these rationales for the presumptive validity of forum selection and choice of law clauses, the Court has noted that contracts entered into freely generally should [*25] be enforced

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[2] The analysis is no different for the arbitration clauses. Indeed, an arbitration clause is merely a specialized type of forum selection clause. *See Scherk*, 417 U.S. at 519. We might have referred to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517 (United States entered on December 29, 1970), *reprinted in* 9 U.S.C. §§ 201-08 (the Treaty), for further support with respect to the arbitration clauses; however, because we are not entirely persuaded that the Treaty applies in the securities context, we prefer to rest our decision on different grounds. Because we understand the Roby Names to complain primarily that the United States securities laws will not be applied and not that the arbitration forum is particularly inappropriate in their case, we do not believe a detailed analysis of the Treaty is necessary.

because the financial effect of forum selection and choice of law clauses likely will be reflected in the value of the contract as a whole. *Carnival Cruise Lines*, 111 S. Ct. at 1527.

This presumption of validity may be overcome, however, by a clear showing that the clauses are "'unreasonable' under the circumstances." *The Bremen*, 407 U.S. at 10. The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching, 111 S. Ct. at 1528; 407 U.S. at 12-13; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum, 407 U.S. at 18; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, 111 S. Ct. at 1528; or (4) if the clauses contravene a strong public policy of the forum state, 407 U.S. at 15.

In this case, we can easily dispose of the first two factors. The Roby Names do not contend that they were fraudulently induced into agreeing to the forum selection, choice of law or arbitration clauses. Nor do we believe it gravely inconvenient [*27] for the Roby Names to litigate in London; they found it convenient enough to travel there for their mandatory interviews, and, in any event, many of them presently are prosecuting actions there. Moreover, nothing in the record suggests that the English courts would be biased or otherwise unfair, and United States courts consistently have found them to be neutral and just forums. *See, e.g., Syndicate 420 at Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 829 (5th Cir. 1986). Finally, the Roby Names have not presented any convincing evidence that the chosen arbitral forum would be biased in any way.

As to the third factor, we note that it is not enough that the foreign law or procedure merely be different or less favorable than that of the United States. *See, e.g., Mitsubishi*, 473 U.S. at 629; *Medoil v. Citicorp*, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990). Instead, the question is whether the application of the foreign law presents a danger that the Roby Names "will be deprived of any

remedy or treated unfairly." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981), [*28] *reh'g denied*, 455 U.S. 928, 71 L. Ed. 2d 474, 102 S. Ct. 1296 (1982) (emphasis added) (in *forum non conveniens* context). As we explain below in section C, we believe the Roby Names have ample remedies under English law.

B. *Public Policy*

We depart somewhat from the *Riley* Court with respect to the fourth factor. We believe that there is a serious question whether United States public policy has been subverted by the Lloyd's clauses. In this section we explain our concerns; in section C below we resolve those concerns. Ultimately, we hold that the presumption of validity has not been overcome.

The Supreme Court in *The Bremen* wrote, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 15. By including antiwaiver provisions in the securities laws, Congress made clear its intention that the public policies incorporated into those laws should not be thwarted.

The framers of the securities laws were concerned principally with reversing the common law rule favoring "caveat emptor." *See, e.g., SEC v. Arthur Young & Co.*, 190 U.S. App. D.C. 37, 584 F.2d 1018, 1025 n.51 (D.C. Cir. 1978), [*29] *cert. denied*, 439 U.S. 1071, 59 L. Ed. 2d 37, 99 S. Ct. 841 (1979). To this end, the securities laws are aimed at prospectively protecting American investors from injury by demanding "full and fair disclosure" from issuers. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-28, 44 L. Ed. 2d 539, 95 S. Ct. 1917, *reh'g denied*, 423 U.S. 884, 46 L. Ed. 2d 114, 96 S. Ct. 157 (1975). Private actions exist under the securities laws not because Congress had an overwhelming desire to shift losses after the fact, but rather because private actions provide a potent means of deterring the exploitation of American investors. *See, e.g., Randall v. Loftsgaarden*, 478 U.S. 647, 664, 92 L. Ed. 2d 525, 106 S. Ct. 3143 (1986); *Abrahamson v. Fleschner*, 568 F.2d 862,

872 (2d Cir. 1977), *cert. denied*, 436 U.S. 913, 56 L. Ed. 2d 414, 98 S. Ct. 2253 (1978). We believe therefore that the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors.

In this sense, the securities laws somewhat resemble the antitrust laws at issue in *Mitsubishi*. The *Mitsubishi* Court enforced [*30] a clause providing that all disputes arising under a contract between a Puerto Rican corporation and a Japanese corporation be submitted for arbitration by the Japan Commercial Arbitration Association. The Court recognized that private actions under the Sherman Act, 15 U.S.C. § 1 *et seq.*, play a "central role" in promoting the national interest in a competitive economy, 473 U.S. at 634-35. Like private actions in the securities context, private actions under the Sherman Act serve primarily a deterrent purpose. *Id.* at 635. Nevertheless, the *Mitsubishi* Court held that a Japanese arbitration panel, *applying United States antitrust law*, adequately would further the deterrent purpose of the Sherman Act, despite the panel's lack of allegiance to United States' interests. *Id.* at 636-37. The Court indicated quite clearly in dicta, however, that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning [*31] the agreement as against public policy." *Id.* at 637 n.19.[3]

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[3] *Scherck*, decided eleven years before *Mitsubishi*, is not to the contrary. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449, *reh'g denied*, 419 U.S. 885, 42 L. Ed. 2d 129, 95 S. Ct. 157 (1974). Although the *Scherck* Court enforced an arbitration clause which contained a choice of law provision (Illinois law), the focus of the opinion is almost exclusively on the validity of the *arbitration* provision. Nowhere in the opinion is it suggested that a choice of law clause invariably trumps the public policies underlying the securities laws. In any event, Illinois law is certainly adequate

(continued...)

We are concerned in the present case that the Roby Names' contract clauses may operate "in tandem" as a prospective waiver of the statutory remedies for securities violations, thereby circumventing the strong and expansive public policy in deterring such violations. We are cognizant of the important reasons for enforcing such clauses in Lloyd's' agreements. Lloyd's is a British concern which raises capital in over 80 nations. Its operations are clearly international in scope. There can be no doubt that the contract clauses mitigate the uncertainty regarding choice of law and forum inherent in the multinational affairs of Lloyd's. Comity also weighs in favor of enforcing the clauses. Yet we do not believe that a United States court can in good conscience enforce clauses that subvert a strong national policy, particularly one that for over fifty years has served as the foundation for the United States financial markets and business community. In this case, the victims of Lloyd's' alleged securities violations are hundreds of individual American investors, most of whom were actively solicited in the United States by Lloyd's representatives. We believe that if the Roby Names were able [*33] to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection and arbitration clauses as against public policy. For the reasons set forth in section C below, however, we conclude that the Roby Names have failed to make such a showing.

C. *Availability of Adequate Remedies*

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[3](...continued)
to protect the substantive rights of Alberto-Culver, the American company that allegedly was defrauded in its purchase of Scherck, a German company. Indeed, viewed practically, the complaint was essentially a breach of contract action masquerading as a statutory misrepresentation claim. The Court could confidently rely on Illinois law to protect any public policy of the United States implicated in that action.

We are satisfied not only that the Roby Names have several adequate remedies in England to vindicate their substantive rights, but also that in *this* case the policies of ensuring full and fair disclosure and deterring the exploitation of United States investors have not been subverted. We address the fraud and misrepresentation claims first.

1. *Fraud and Misrepresentation*

English common law provides remedies for knowing or reckless deceit, negligent misrepresentation, and even innocent misrepresentation. Affidavit of Anthony Colman P 20. Moreover, the Misrepresentation Act of 1967 provides some additional statutory remedies. *Id.* While the Roby Names might have been able to sue "controlling persons" under the United States [*34] securities laws and establish liability without proving reliance, it certainly is not unfair for English law to require proof of actual misconduct and reliance. Furthermore we are skeptical that "controlling person" liability could be established against many of the defendants here. For instance, we question whether the Lloyd's' governing bodies have "control" over other Lloyd's entities in the sense intended under the securities laws. *See, e.g.*, 17 C.F.R. § 230.405 (1992) (defining "control"); *Harrison v. Dean Witter Reynolds*, 974 F.2d 873, 881 (7th Cir. 1992).

In any event, the available remedies are adequate and the potential recoveries substantial. This is particularly true given the low scienter requirements under English Misrepresentation law (*e.g.*, negligence, "innocence"). Moreover, together with the contractual obligations imposing certain fiduciary and similar duties on Members' and Managing Agents, we believe that the available remedies and potential damages recoveries suffice to deter deception of American investors.

In this context we also note that many of the so-called "misrepresentations" the Roby Names allege are really complaints [*35] about the conduct of Lloyd's' affairs rather than complaints about fraudulent reporting. Thus, for instance, while it may be true that the defendants kept insufficient reserves and permitted

"questionable accounting practices," failure to convey this information to the Roby Names is more a violation of the letter of the securities laws than their spirit, because the complaints really address Lloyd's' misconduct *after* securities are sold. We do not believe that these complaints implicate the public policy of the securities laws.

Finally, although, as the Roby Names observe, section 14 of the Lloyd's Act of 1982 exempts the Corporation of Lloyd's (and its officers and employees) from liability, no other entity within Lloyd's is exempt. Moreover, even the Corporation of Lloyd's is not exempt for acts "done in bad faith." Furthermore, as a self-regulating organization, we cannot say that Lloyd's' own bylaws will not insure the honesty and forthrightness that American investors deserve and expect. We conclude that the Roby Names have adequate remedies in England to vindicate their statutory fraud and misrepresentation claims.

2. *Disclosure*

We turn now to address whether adequate [*36] remedies are available to deter issuers from issuing securities without disclosing sufficient information to permit investors to make informed decisions. We believe that this policy concern is somewhat diluted in this case because the SEC consistently has exempted Lloyd's from the registration requirements of the securities laws. Apparently the SEC has decided that Lloyd's' means test meets the requirements of Regulation D. We are extremely reluctant to dispute the SEC's apparent judgment that the Roby Names are sophisticated enough that they do not need the disclosure protections of the securities laws.

In any event, English law in this case provides Lloyd's entities with an adequate inducement to disclose material information to American investors: failure to do so gives rise to liability for breach of contract. For instance, the Members' Agent's Agreement requires each Members' Agent "promptly" to provide Names with a host of information, and to

> disclose . . . in good time *any information* in its possession relating to any of the Contracted Syndicates, or to any syndicate which the Agent has advised the Name to join . . . *which could reasonably be expected to influence [*37] the Name* in deciding whether to become or remain a member of, or to increase or reduce his participation in, any such syndicate, and *use its reasonable endeavors to obtain any such information*.

(emphasis added). Similarly, paragraph 4.2(i) of the Managing Agent's Agreement requires Managing Agents to disclose "in good time" relevant information to the Name or his Members' Agent. The Roby Names, therefore, certainly can allege breach of contract claims under English law. In addition, under their contract Members' Agents owe certain fiduciary duties to Names which provide a further basis for suit.

While we do not doubt that the United States securities laws would provide the Roby Names with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements, we are convinced that there are ample and just remedies under English law. Moreover, we cannot say that the policies underlying our securities laws will be offended by the application of English law. In this case, the Roby Names have entered into contracts that require substantial disclosure by both the Members' and Managing Agents. The specter of liability for breach of [*38] contract should act as an adequate deterrent to the exploitation of American investors. The well developed English law of fraud and misrepresentation likewise adequately requires that the disclosure be "fair."

III. *Application of RICO*

That RICO provides treble damages and seeks to deter persistent misconduct does not dissuade us from our view that the Roby Names' contract clauses must be enforced. As we have explained, the Roby Names have adequate potential remedies in England and there are significant disincentives to deter English

issuers from unfairly exploiting American investors. Although the remedies and disincentives might be magnified by the application of RICO, we cannot say that application of English law would subvert the policies underlying that statute.

CONCLUSION

For the foregoing reasons we hold that the Roby Names' contract clauses cover the scope of, and the parties named in, the complaint and that the Roby Names have remedies under English law adequate not only to vindicate their substantive rights but also to protect the public policies established by the United States securities laws.

The judgment and order of the district court are affirmed.

APPENDIX D

APPENDIX D

District Court Opinion and Order Dated June 12, 1992

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN S. ROBY, et al.,

Plaintiffs,

-against-

THE CORPORATION OF LLOYD'S a/k/a THE SOCIETY AND COUNCIL OF LLOYD'S d/b/a LLOYD'S OF LONDON, et al.,

Defendants.

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91 Civ. 7081 (MEL)

796 F. Supp. 103; 1992 U.S. Dist. LEXIS 8210; Fed. Sec. L. Rep. (CCH) P96,825

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JUDGES: Lasker

OPINION BY: MORRIS E. LASKER

OPINION: [*103] OPINION

LASKER, D.J.

This action alleges violations of the federal securities laws and RICO[1] against various entities which are part of the enterprise known as Lloyd's of London. The 91 investor-plaintiffs allege that solicitation of investor/underwriters in the United States by Lloyd's agents constitutes "sale of securities" and that Lloyd's syndicates are "issuers" within the meaning of the securities laws. They assert that they were deceived as to, *inter alia*, the types of risks assumed by, and the experience of the underwriters of, the syndicates in which they invested. The syndicates are groups of [*104] insurer-investors which are organized for the purpose of assuming insurance risks.

[**2]

The Syndicate Defendants move to dismiss the action as to them pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Fed. R. Civ. P., on the ground that they are not legal entities capable of being sued. The dispositive question is whether a syndicate exists as a separate legal entity apart from the investors in the syndicates (who are generally known as Names); or whether, as the syndicates claim, they are merely "groupings" of individual Lloyd's underwriters who severally undertake insurance obligations.

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[1] The RICO counts are predicated exclusively on the alleged securities violations.

The syndicates contend that the law of England controls the question of their legal existence -- England being the syndicates' home jurisdiction and the forum designated under plaintiffs' various agreements with the Lloyd's community --, or failing that, that the law of New York, the situs of this action, controls. The plaintiffs submit that federal law, in particular the Securities Act of 1933 and the Securities and Exchange Act of 1934 in combination with Fed. R. Civ. P. 17(b), controls.

The syndicates' motion is granted.

I.

Lloyd's of London is a venerable institution, dating back to the latter part of the seventeenth century, long known for its insurance [**3] business. Although Lloyd's is generally considered to be a unitary organization, it actually is not, and in fact bears little resemblance to the typical corporate insurer. It issues no insurance policies. Rather, it acts as a market for the buying and selling of insurance risks.

According to the syndicates, the closest American analogue to Lloyd's is the New York Stock Exchange. Lloyd's provides the premises, administrative staff and support services for the market; it also issues rules and regulations and monitors transactions that occur in the market. Like the New York Stock Exchange, Lloyd's does not participate in individual decisions made by its brokers, members or underwriters.

The persons who carry on the business at Lloyd's are, respectively, the brokers, active underwriters, member's agents, managing agents, and Names (who make up the syndicates). The Names are the individual investors. They pay fees and delegate complete authority to conduct Lloyd's affairs to "member's agents." Although Names are the ultimate underwriters of the insurance, they do not participate actively in the underwriting process or in the recruiting of other Names to the syndicates. They have no management [**4] authority and cannot bind their fellow members or the syndicate. Membership in a Lloyd's

syndicate is personal and not transferable and terminates upon the death of the member.

Member's agents recruit new Names and handle the admission of Names to Lloyd's membership. Member's agents are ordinarily also chosen to act as Names' underwriting agents[2] and, in that role, are responsible for placing Names in syndicates. In connection with the latter, the member's agent contracts with a "managing agent" to place the member in a group comprised of two to several hundred other Names. These groups constitute the syndicates. Managing agents run the syndicates. They hire the syndicate's active underwriter and maintain the syndicates' accounts and other records, among other things.

An employee of the managing agent, known as the "active [**5] underwriter," acts on behalf of the Names in a syndicate in the "buying" and "selling" of insurance risks; Active underwriters are seated on the underwriting floor at Lloyd's in London. Brokers approach the active underwriter at his desk -- in Lloyd's parlance "the box" -- to solicit the underwriter's agreement to accept a risk. The active underwriter decides which of the risks, offered to him by brokers, to accept and at what premium, and negotiates the conditions of coverage and the proportion of risk his syndicate will [*105] assume. *See Syndicate 420 at Lloyd's London v. Early American Insurance Co. Ltd*, 796 F.2d 821, 824 (5th Cir. 1986).

Through their syndicates, Names subscribe to a certain percentage of the risk on policies, in return for a certain percentage of the premium paid to the syndicate by the insured. Normally, syndicates do not insure 100% of a risk. Rather, a number of syndicates agree to subscribe, each assuming a specified portion of the total risk. A syndicate member is entitled to a specified

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[2] Managing agents, discussed below, can also be chosen to act as the Names' underwriting agents to perform the function of placing Names in syndicates, but ordinarily a member's agent is chosen.

(contracted-for) share of the profits from the syndicate's business and is responsible for that share of loss only.

Although Names have unlimited personal [**6] liability for their respective share of the risk, a Name has no responsibility whatsoever for the liability of his fellow syndicate members. Section 8(i) of the Lloyd's Act of 1982 states:

> An underwriting member shall be a party to a contract of insurance underwritten at Lloyd's only if it is underwritten with several liability, each underwriting member for his own part and not one for another and if the liability of each underwriting member is accepted solely for his own account.

In addition, when a Name becomes a member of a syndicate, the contract he or she signs specifies that

> [nothing in his or her agreement with the relevant member's agent or managing agent] shall constitute a partnership between the Name and the Agent or between the Name and any or all of the other members of the Contracted Syndicates.

Schedule 1, Clause 16.1, Lloyd's Byelaw No. 8 of 1988 Agency Agreements.

> Nothing in this Agreement shall constitute any partnership between . . . the Name and any other person or persons whomsoever . . . .

Schedule 1, Clause 20, to Lloyd's Byelaw No. 1 of 1985 Agency Agreements.

Syndicates exist for one year, at the end of which they are dissolved and reconstituted. [**7] However, although syndicates are identified by numbers (*e.g.*, Syndicate No. 670), the numbers are often reused from year to year and often, at their option, many of the same Names remain members. The Names elect each year

which syndicates they wish to join. A syndicate closes its accounts for a given year by transferring its potential liabilities to the members of the syndicate in the following year of account, a practice called "reinsurance to close," and the same managing agents usually run the syndicates from year to year.

There are approximately 365 syndicates in the Lloyd's system. 300 of them, identified by numerical reference in the caption to the complaint, are named as defendants in this action. They are the syndicates to which the 91 plaintiff-investors belonged.

II.

The Syndicate Defendants argue, and ordinarily it would be the case, that either English or New York law controls as to the legal status of the syndicates. It is syndicates' position that their legal status in England is controlling on the issue of whether they are amenable to suit here and that New York law, if it applies, supports their position. However, according to plaintiffs, federal law controls [**8] and that federal law is said to be found in the Securities Acts together with the provisions of Fed. R. Civ. P. 17(b). In brief, plaintiffs assert that Congress legislated that "persons" that are "issuers" are subject to the Securities Act of 1933 and the Securities and Exchange Act of 1934 and automatically have legal existence. Plaintiffs contend that Fed. R. Civ. P. 17(b) makes clear "the rule-maker's goal of removing any procedural obstacles to fulfillment of Congress's intent." (Letter to Court from Plaintiffs' Counsel (March 26, 1992)).

We conclude that English law applies, but whether the test be under English or New York or federal law, the syndicates do not have legal existence.

III.

It is undisputed that under the law of England, the syndicates do not constitute legal entities. Plaintiffs themselves [*106]

have submitted a barrister's affidavit that squarely concedes the proposition:

> As a matter of law, English courts would be bound to treat the syndicates as unincorporated groups of separate traders, without legal personalities, that could not be sued other than by proceeding against all their individual members or against a representative member or members.

Affidavit [**9] of Anthony Colman, ¶ 28. Plaintiffs concede that under English common law, the syndicates would not be amenable to suit under any claims plaintiffs might bring in the United Kingdom. All of the literature concerning Lloyd's defines syndicates as a group of Names on behalf of whom an underwriter accepts insurance business. Standard reference works are replete with comments such as the following: "a syndicate is not a legal entity;"[3] "all Names are . . . sole traders;"[4] "the syndicate itself is not an insuring entity, simply an 'annual venture' between individual Names;"[5] and "Lloyd's structure [is] of a Society of Names trading as sole traders."[6] Furthermore, the informational packets provided to the prospective Names -- and thus every plaintiff-investor here --, as well as the membership documents

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[3] J. Cowen, *Lloyd's Regulatory Requirements* (Chartered Insurance Institute 1991) (glossary).

[4] Stephen Lewis & Jan Woloniecki, "Lloyd's: The Market Structure," *in Lloyd's, the ILU and the London Insurance Market*, at 39 (PLI Comm. L. & Prac. No. 472 1988). [**10]

[5] *Lloyd's: A Route Forward* (1992) (a task force report).

[6] *Id.*

signed by each Name, specify that syndicates are not legal entities.[7]

If English law applies, therefore, the syndicates' motion must be granted.

* * *

To become a Name, an individual must be nominated and seconded and have established certain minimum financial net worth tests. Under Lloyd's bylaws, the Name is required to travel to London to submit to an interview at Lloyd's. Upon acceptance into the society of Lloyd's, the individual executes a number of documents, among which are the premium trust deed, a member's agent agreement, and a managing agent agreement. Each of the documents provides that it is to be governed by the law of England. Each by its terms provides for dispute resolution either in the courts or in arbitration, as the document may be, in England. There are presently approximately 26,000 names world-wide; 21,000 plus, [**11] or 80 percent, are English citizens. The syndicates argue that because the English Names vastly predominate in the group, because the documents which they execute specify the application of English law and the disposition of disputes in England, and because the documents were all executed in England, English law applies.

In addition, this outcome makes particular sense in this case, according to the syndicates, because it involves agreements with Names throughout the world. As the syndicates reasonably note, it would destroy uniformity of treatment and undermine commercial stability if the determination of the legal existence of

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[7] The membership brochures state:

> A syndicate is not a legal entity. Each member of the syndicate is responsible only for the proportion of business written on his behalf. It is a matter of each for his own part and not one for another.

the Lloyd's syndicates depended on the fortuitous fact of where a Name's lawyer's office was located, which Name sues, where he or she sues, or what cause of action he or she sues on.

In *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 698 (2d Cir. 1970), *cert. denied*, 403 U.S. 905, 29 L. Ed. 2d 680, 91 S. Ct. 2205, (1971), the court, quoting then District Judge Mansfield, held that the legal existence of a foreign corporate entity "must be determined by the laws of the country where it has been created and continues to exist." *Id.*[8] It [**12] is true that the [*107] quoted statement in *Carl Zeiss* was dicta with regard to legal existence because the sole issue there was that of identity between successor entities. Nevertheless, the rule enunciated is still persuasive authority.

New York choice of law rules would reach the same result. In choice of law cases, New York courts apply the criterion of "interests analysis," under which "the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation," controls. *Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 581 N.E. 2d 1042, 575 N.Y.S.2d 796 (Ct. App. 1991). [**13] Under this standard, because Lloyd's is based in London and approximately 80% of the Names are English citizens, English law governs.

IV.

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[8] *Carl Zeiss* states:

> the legal existence, status, identity, and domicile of a foreign corporate entity or juristic personality, such as the Foundation here, must be determined by the laws of the country where it has been created and continues to exist.

Id. (quoting the district court decision by Judge Mansfield, 293 F. Supp. 892, 898 (S.D.N.Y. 1968)).

Although I conclude that English law governs, the application of substantive New York law would result in the same outcome.

This court has previously considered the question whether syndicates qualify under the New York statutory definition of "unincorporated associations," which is the only possible legal classification the syndicates could belong to, since they are neither corporations, partnerships nor individuals.[9] In *Bobe v. Lloyd's*, 27 F.2d 340, 345 (S.D.N.Y. 1927), *aff'd per curiam*, 27 F.2d 347 (2d Cir. 1928), the court held that the syndicates do not constitute unincorporated associations within the meaning of Section 13 of the New York General Associations Law, the controlling provision. In *Bobe*, a Special Master considered the issue of the syndicates' legal existence under New York statutory law and held, in a report which the court confirmed, that Lloyd's syndicates were not unincorporated associations under New York law, after noting that the Names' "libility was several, not joint, and [**14] that each underwriter was obligated only for the amount of his individual underwriting irrespective of the obligation of any of the other underwriters." *Id.*

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[9] Plaintiffs more or less concede that the syndicates are not partnerships which would appear to be an obvious conclusion since syndicates lack the essential characteristic of a partnership -- joint liability. However, in a footnote to their brief, they remark:

> Although ostensibly Names are not jointly and severally liable for syndicates' debts, discovery may show that the syndicates are also partnerships by estoppel under Section 27 of the New York Partnership Law, at least for purposes of their transactions in the United States.

No indication whatsoever has been provided as to what type of evidence plaintiffs expect to uncover through discovery that might establish a relationship of "partnerships by estoppel."

Plaintiffs argue that the first *Bobe* decision, 10 F.2d 730 (2d Cir.), *cert. denied*, 270 U.S. 663, 70 L. Ed. 788, 46 S. Ct. 472, (1926), [**15] not the *Bobe* decision cited by the syndicates, 27 F.2d 340, 345 (S.D.N.Y. 1927), *aff'd per curiam*, 27 F.2d 347 (2d Cir. 1928), is controlling as to the syndicate's legal existence. In the first decision, according to plaintiffs, the Second Circuit remanded for additional fact-finding on the issue of whether service of process was properly made on the treasurer or the president of the syndicates. The plaintiffs add that there would have been no need for remand as to service of process if the record before the Second Circuit had not been sufficient to establish that syndicates were unincorporated associations under Section 13. Plaintiffs' position is misguided for two reasons. *First*, the earlier *Bobe* decision did not rule that the syndicates were unincorporated associations but only that the allegations of the complaint properly alleged them to be unincorporated associations. *Second*, the later and final *Bobe* decision specifically held at the District Court level, after fact-finding, that the syndicates were not unincorporated associations, and this decision was affirmed without opinion by the Court of Appeals.

V.

As indicated [**16] above, plaintiffs take the position that United States law controls. They argue that the Securities Acts together [*108] with Fed. R. Civ. P. 17(b) establish the legal existence of the syndicates.

A. Plaintiffs' contentions under securities laws

As we understand plaintiffs' argument, which in our eyes is particularly convoluted,[10] it is that the only question before the

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[10] The following excerpt from the letter of plaintiffs' counsel to the Court, dated March 26, 1992, in response to the Syndicate Defendants' rely brief, sets forth plaintiffs' theory:

(continued...)

Court is whether the syndicates constitute "persons" under the federal securities laws. They argue that, as issuers of securities, the syndicates are by definition, that is, without more, suable under the United States securities laws. But this argument begs the very question which must be decided. In *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992), the Eleventh Circuit explicitly rejected a similar contention:

> The question here is not whether the Jefferson County Sheriff's Department is a 'person' for purposes of

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[10](...continued)

> What plaintiffs allege is that the syndicates' liability here derives from their status as issuers of securities under the federal securities laws. The syndicates' legal existence and amenability to suit here rest not on Rule 17(b), but on Congress's creation of that very class of entities -- issuers of securities. Under plaintiffs' analysis, for purposes of this motion, the only question before the Court is whether the syndicates are issuers -- that is whether they constitute "persons" under the federal securities laws and whether they "issue or offer to issue" securities. Whether the syndicates constitute "persons," in turn, depends on whether they are "unincorporated associations" (under the Securities Acts) or "organized groups of persons whether incorporated or not" (under the Securities and Exchange Act). Plaintiffs do not contend that Rule 17(b) gives the answer to that question. Rule 17(b) simply shows which substantive law -- state, federal or foreign -- does. Here, where plaintiffs allege federal securities law violations, Congress has answered that question in the securities laws by declaring that the syndicates may be sued for issuing securities in violation of the federal securities laws. Rule 17(b) merely clarifies the rule-makers' goal of removing an procedural obstacles to fulfillment of Congress's intent.

> liability under *Monell* and section 1983, but whether the Department is a legal entity subject to suit.

951 F.2d at 1214.

[**17]

The American legal system distinguishes between the concepts of causes of action, on the one hand, and persons who can be sued, on the other. The Securities Acts, supplemented by judicial decisions, do, of course, create various causes of action. But nowhere do they purport to confer legal existence. The Securities Acts provide only that "issuers" are persons who issue securities, and "persons" include "unincorporated associations"[11] or "organized group of persons,"[12] but these provisions do not solve the problem posed by this case because they give no definition of what constitutes an "unincorporated association" or "organized group of persons," and the cases which plaintiffs rely upon for such further definition do not deal with the Securities Acts or their terminology.

United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 351, 66 L. Ed. 975, 42 S. Ct. 570, (1922), [**18] is a case upon which plaintiffs place substantial reliance. There, the Supreme Court held that unincorporated labor unions, such as the United Mine Workers of America, and its district and local branches -- recognized as distinct entities by numerous acts of Congress, as well as by the laws and decisions of many states -- were suable under the Sherman Act. However, the Sherman Act, in contrast to the Securities Acts, includes a precise definition of the extent to which an association or group might be held liable as a "person" under the act:

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[11] Section 2(2) of the Securities Act, 15 U.S.C. § 77b(2).

[12] Section 3(a)(9) of the Securities and Exchange Act, 15 U.S.C. § 78c(9) and section 3(a)(19), 15 U.S.C. § 78c(19).

> § 7. "Person" defined
>
> The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. [*109]

Sherman Act, 15 U.S.C. § 7. The securities laws provide no such guidance as to who can be sued under them. Plaintiffs themselves concede that neither the Securities Act of 1933 nor the Securities and Exchange Act of 1934 defines an "unincorporated association" and rely on federal judicial decisions to provide the definition [**19] of that term, but, as stated above, the cited decisions do not construe the Securities Acts.

Moreover, no provision of the Securities Acts indicates a legislative intent to confer legal existence on any entity that was not suable prior to enactment of the Securities Acts, and plaintiffs point us to no authority, either in the legislative history of the Acts or judicial decisions, which supports their argument.

Finally, whatever authority there is as to whether the syndicates are "issuers" altogether undermines the plaintiffs' position and specifically the position of the named plaintiff in this case. In a letter to Congressman Don J. Pease of the United States House of Representatives from Mary E. T. Beach, Senior Associate Director of the SEC, dated August 5, 1991, in response to a letter from him forwarding questions raised by his constituent, John S. Roby (the lead plaintiff here), Ms. Beach states:

> The staff of the Commission's Division of Corporation Finance has had discussions on two occasions with Lloyd's concerning the applicability of the Securities Act of 1933 . . . and the Securities and Exchange Act of 1934 . . . to the solicitation of U.S. Citizens to participate [**20] in Lloyd's. It is the Division's position that the solicitation of participations involves

> the sale of a security, with the issuer of that security being the particular Members' Agent [not the syndicate] involved.

Thus such authority as there is refutes the argument that, in plaintiffs' words, Congress "deemed" syndicates to be among the class of possible defendants under the federal securities laws.

B. Plaintiffs' contentions under Rule 17(b)

Rule 17(b) provides in pertinent part:

> *Capacity to Sue or be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, *except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws [**21] of the United States*, ... (emphasis added).

Plaintiffs argue that because they "have sued the syndicates only under the federal securities and RICO laws, and hence seek to enforce only federal substantive rights, the syndicates' capacity to be sued is governed by Fed. R. Civ. P. 17(b)." As the plaintiffs' counsel states in his letter to the court of April 2, 1992:

> in promulgating Fed. R. Civ. P 17(b) in 1937, the Supreme Court consciously acted to federalize the definition of an 'unincorporated association' where, as here, Congress through specific legislation intended to render an unincorporated association subject to suit, notwithstanding any contrary bar or absence of

> authority under otherwise applicable law, whether state or foreign.

The Syndicate Defendants respond that plaintiffs' theory is analytically flawed. They contend that, as a rule of civil procedure, Rule 17(b) confers no substantive rights and is not triggered until a Court has first made the threshold determination that the party in question is a legal entity. They maintain that Rule 17(b) does not purport to, and cannot constitutionally, establish the legal existence of a particular entity. Creation [**22] of a legal entity, other than an individual, according to the syndicates, can be accomplished only by legislation, not by a rule of procedure.

[*110] **1. Legal existence and capacity to sue and be sued are distinct concepts on their face**

Capacity to be sued and legal existence are separate and distinct concepts. Both capacity to be sued and legal existence are prerequisites to the suability of an entity, but Rule 17(b) speaks only to capacity to sue or be sued.

That legal existence and capacity to be sued are distinct concepts is made clear by the language of Rule 9(a) of the Fed. R. Civ. P. which specifically distinguishes between the "legal existence of any party," on the one hand, and "the capacity of any party to sue or be sued," on the other.[13] Judicial decisions -- even those cited by plaintiffs -- demonstrate that Rule 17(b) addresses only the question of capacity to sue or be sued. *See, e.g., Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 858, 865-66 (S.D.N.Y. 1990) (treating issue of legal existence and capacity to sue separately), *vacated on other grounds*, 937 F.2d 44

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[13] Rule 9. *Pleading Special Matters*

> (1) *Capacity*. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. . . .

(2d Cir. 1991) (on other grounds); *Associated Students v. Kleindienst*, 60 F.R.D. 65, 67 (C.D. Cal. 1973) [**23] (same).[14]

[**24]

Put another way, the reach of Rule 17(b) is limited to providing that partnerships or other unincorporated associations which have no capacity under state law to sue or be sued may nevertheless sue or be sued in their common name in federal court for the purpose of enforcing for or against them a substantive right existing under the Constitution or laws of the United States, but Rule 17(b) does not confer legal existence or create new types of legal entities.

Plaintiffs contend that formal organization or compliance with an organizational statute is not required to permit an unincorporated association to be sued on a federal question. But "unincorporated association" is a term of art -- every group that is

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[14] Plaintiffs refer to *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 351, 66 L. Ed. 975, 42 S. Ct. 570, (1922), *supra*, and an article written by Dean (later Judge) Clark and Professor Moore, "A New Federal Procedure -- II. Pleading and Practice," 44 Yale L.J. 1291, 1312-17 (1935), interpreting the Federal Rules of Civil Procedure prior to their adoption. In these works, there is at times a lack of clarity concerning a distinction between the concepts of "legal existence" and "capacity to sue or be sued" which plaintiffs contend proves their point that Rule 17(b) performs the function of providing for both concepts (or that the two concepts are identical). But regardless of what Clark and Moore in their article may or may not say, there is no question that courts have consistently recognized a distinction between the concepts of legal existence and capacity to sue or be sued in the interpretation of Rule 17(b). *See, e.g., Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991) (on other grounds); *Associated Students v. Kleindienst*, 60 F.R.D. 65, 67 (C.D. Cal. 1973).

not a corporation or partnership is not automatically an unincorporated association. "It is well settled that it must appear that an association, if it is not a corporation, has received by appropriate legislation a legal status before it, or its members, may be sued in the name of the group." *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 351, 66 L. Ed. 975, 42 S. Ct. 570, (1922). Plaintiffs have failed to establish that the syndicates are unincorporated associations under any [**25] possibly applicable law -- English, federal or New York State -- and indeed English and New York law are directly to the contrary.

2. Legal existence is a substantive proposition that cannot be controlled by a rule of procedure

A further proposition which undermines the plaintiffs' contention that Rule 17(b) confers legal existence on the syndicates is that to do so would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that the Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right." As the United States Supreme Court has construed the Rules Enabling Act:

> An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to [*111] enlarge that jurisdiction; and the Act . . . authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.

United States v. Sherwood, 312 U.S. 584, 589-590, 85 L. Ed. 1058, 61 S. Ct. 767, (1941). The syndicates submit that if Rule 17(b) were construed to create a legal entity, the court would be performing [**26] a legislative rather than a judicial function. That argument has merit.

The plaintiffs acknowledge that if the issue of legal existence is a substantive proposition, Rule 17(b) could not control

it. The plaintiffs, however, take the position, without citing any authority, that the question of legal existence is procedural, not substantive. While the authority on the point is slim -- perhaps because the answer to the question is obvious --, it favors the syndicates' position. For example, in his discussion of the subject in *Busby v. Electric Utilities Employees Union*, 323 U.S. 72, 76-77, 89 L. Ed. 78, 65 S. Ct. 142, (1944) (concurring), Justice Frankfurter distinguishes between "suability" and "status" and characterizes "suability" as a "procedural matter" and "determination of status" as a "substantive issue." *Id.*

C. Plaintiffs' miscellaneous contentions

In a number of cases in the United States, syndicates have been sued and been treated as legal entities, and some syndicates have themselves sued or asserted counterclaims. Plaintiffs argue that such actions and determinations contradict the syndicates' claim of nonexistence. However, in none of the cases referred to was the question [**27] of the syndicates' legal existence ever raised, nor is there any assertion that any syndicate which is a defendant here was a party to the earlier litigation. The issue of legal existence arose, if at all, only indirectly, in the context of determining what kind of entity a syndicate was for purposes of determining diversity jurisdiction. *See International Insurance Co. v. Certain Underwriters at Lloyd's London*, 1991 U.S. Dist. LEXIS 12,937 (N.D. Ill. 1991) and *Graham v. Lloyd's of London*, 371 S.E.2d 801, 296 S.C. 249 (S.C. App. 1988).

The plaintiffs also suggest that the syndicates must have legal existence because they own property interests in the $9 billion Lloyd's American Trust Fund ("LATF") held by Citibank, N.A., in New York. Even assuming for the moment that the syndicates have an ownership in the funds, plaintiffs have not shown that such ownership would alone confer legal existence upon the syndicates under English, New York or federal law.

Moreover, there is sufficient undisputed material before the Court in the form of affidavits submitted by both sides to support a conclusion that at best the nature of the syndicates' [**28] interest

is not that of an owner or beneficiary but that of a nominee or fund manager. The record is incomplete on this point, but at best what has been presented even by the plaintiffs leaves considerable doubt whether the syndicates own property interests in the LATF. For example, in a post-argument motion filed by the plaintiffs under Fed. R. Civ. P. 56(f) for further discovery on the subject, a supporting barrister's affidavit states: "I would emphasize that there is no money in the LATF that is not Names' money." The direct beneficiaries of the fund appear to be the policy holders, to the extent of their justified insurance claims; the Names having a reversionary interest in any funds left in the LATF after payout of claims.

* * * *

In sum: English law controls, and under English law the syndicates have no legal existence. The result is the same under New York or federal law. Accordingly, the motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is granted. It is unnecessary to determine whether the complaint is defective also under Fed. R. Civ. P. 12(b)(1).

The complaint is dismissed as to the Syndicate Defendants.

It is so ordered.

Dated: June 12, 1992
New York, New York
Morris E. Lasker
U.S.D.J.